No. 03-931
Title: Florida, Petitioner
v.
Joe Elton Nixon
Docketed: December 30, 2003
Lower Ct: Supreme Court of Florida
Case Nos.: (SC92006, SC93192, SC01-2486)
Decision Date: July 10, 2003
Rehearing Denied: October 1, 2003
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Dec 22 2003	Petition for a writ of certiorari filed. (Response due January 29, 2004)
Dec 30 2003	Application (03A544) for a stay of mandate, submitted to Justice Kennedy.
Dec 31 2003	Application (03A544) denied by Justice Kennedy without prejudice to petitioner's right to renew the application in the event further state proceedings are scheduled during the pendency of the petition for writ of certiorari.
Dec 31 2003	Brief of respondent Joe Elton Nixon in opposition to the application filed. (Distributed)
Jan 29 2004	Brief of respondent Joe Elton Nixon in opposition to petition for writ of certiorari filed.
Feb 4 2004	Reply of petitioner Florida filed.
Feb 11 2004	DISTRIBUTED for Conference of February 27, 2004.
Mar 1 2004	Petition GRANTED.
Apr 8 2004	Order extending time to file the joint appendix and petitioner's brief on the merits to and including May 17, 2004.
May 7 2004	Extension of time within which to file respondent's brief on the merits to and including July 21, 2004.
May 12 2004	Brief amicus curiae of Criminal Justice Legal Foundation filed.
May 14 2004	Brief of petitioner Florida filed.
May 14 2004	Joint appendix filed.
May 17 2004	Brief amicus curiae of the United States filed.
Jul 21 2004	Brief of respondent Joe Elton Nixon filed.
Aug 5 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 23 2004	CIRCULATED.
Aug 25 2004	Reply of petitioner Florida filed. (Distributed)
Sep 1 2004	SET FOR ARGUMENT Tuesday, November 2, 2004.
Sep 28 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 4 2004	Record received from Supreme Court of Florida. (2 boxes)
Nov 2 2004	Argued. For petitioner: George S. Lemieux, Deputy Attorney General, Tallahassee, Fla.; and for the United States, as amicus curiae, Irving L. Gornstein, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondents: Edward H. Tillinghast, III, New York, N.Y.

Supreme Court, U.S.
FILED

03 931 DEC 22 2003

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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA, *Petitioner*,

v.

JOE ELTON NIXON, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

1. IN A CAPITAL MURDER CASE, THE FLORIDA SUPREME COURT:

(A) APPLIED AN INCORRECT STANDARD, CONTRARY TO *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984), *BELL V. CONE*, 535 U.S. 685 (2002) AND *ROE V. FLORES-ORTEGA*, 120 S.CT. 1029 (2000), BY FINDING DEFENSE COUNSEL INEFFECTIVE *PER SE* UNDER *UNITED STATES V. CRONIC*, 466 U.S. 648 (1984) DESPITE HAVING FOUND COUNSEL'S STRATEGY NOT TO CONTEST OVERWHELMING EVIDENCE OF GUILT BUT TO VIGOROUSLY CONTEST THE SENTENCE IN THE DEFENDANT'S BEST INTEREST AND REASONABLY CALCULATED TO AVOID A DEATH SENTENCE, AND

(B) ERRED IN CONCLUDING THAT *BOYKIN V. ALABAMA*, 395 U.S.238 (1969) PROHIBITED TRIAL COUNSEL FROM ADOPTING A STRATEGY, AFTER FULLY INFORMING HIS CLIENT, WITHOUT OBJECTION, NOT TO CONTEST OVERWHELMING EVIDENCE OF GUILT TO PROTECT THE BEST INTEREST OF HIS CLIENT IN CONTESTING THE APPROPRIATENESS OF IMPOSING THE DEATH PENALTY.

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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

State of Florida, *Petitioner*,

v.

Joe Elton Nixon, *Respondent.*

OPINION BELOW

The opinion below is reported as Nixon v. State, 857 So.2d 172 (Fla. 2003) (hereafter, Nixon III) .[1]

Petitioner's Appendix contains the opinion of the Florida Supreme Court in Nixon III (A2-A36), the Florida Supreme Court's order denying Petitioner's motion for rehearing (A1), and the opinion of the Florida Court in Nixon v. State, 758 So.2d 618 (Fla. 2000) (hereafter, Nixon II) (A37-A70).[2]

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[1] Nixon I is the decision of the Florida Supreme Court affirming Respondent's conviction and sentence on direct appeal, reported at Nixon v. State, 572 So.2d 1336 (Fla. 1990). Nixon II is the decision of the Florida Supreme Court remanding for evidentiary hearing to determine whether Respondent had expressly agreed to trial counsel's strategy, reported at Nixon v. State, 758 So.2d 618 (Fla. 2000). Nixon III is the decision of the Florida Supreme Court following the Nixon II remand.

[2] The symbol "A" followed by the appropriate page number expresses a citation to the materials contained in the Appendix to this pleading.

JURISDICTION

The decision below, resolving Respondent's federal claim that he was denied the effective assistance of counsel at his original trial, was entered on July 10, 2003. On October 1, 2003, the Florida Supreme Court denied the State's Motion for Rehearing. Jurisdiction of this Court is timely invoked pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner contends that the following amendments to the United States Constitution are involved:

The Sixth Amendment of the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The Sixth Amendment is applicable to the States through the Fourteenth Amendment of the United States Constitution which provides in pertinent part:

> Section 1. No State shall . . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent Joe Elton Nixon was convicted of first-degree murder, kidnapping, robbery and arson, and sentenced to death on the first-degree murder conviction. The record shows that Nixon kidnapped the victim, Jeanne Bickner, from a Tallahassee mall, took her to a wooded area several miles outside Tallahassee, tied her to a tree using jumper cables, and set her on fire, burning away most of her left leg and arm, and almost all of her hair and skin.

Nixon informed his trial counsel he was willing to plead to all charges in exchange for a life sentence. Trial counsel Michael Corin presented this offer to the prosecutor, who rejected it due to the overwhelming evidence and the severity of the case (Supp. TR 4, 82-84).[3] Corin saw "no benefit" to entering a plea of guilty without a recommendation of life. Hearing of May 11, 2002, at p. 476-77. However, it was Corin's judgment that contesting the state's overwhelming evidence of guilt would damage the credibility of otherwise plausible arguments he could make at the penalty phase for a life sentence. Believing, as did the State, that sentence was the real issue in the case, he decided as a matter of strategy not to contest the state's evidence at the guilt phase, but to contest sentence vigorously. *Id.* at 425-26, 440-41, 460.

Jury selection took three days. The trial of the guilt phase took another three days. In his opening statement, Corin told the jury the real issue in this case was going to be sentencing; the state, he acknowledged, would be able to prove that Respondent had caused the victim's death, but following the trial would be a penalty phase where the jurors would "learn many facts about Joe Elton Nixon" and, after they heard all the evidence, they would know the "reasons" why "his life should be spared." (TR 1853).

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[3] Citation "TR" is to the original trial transcript; "Supp. TR" references supplements to the original trial transcript, made a part of the original record on appeal.

In his closing argument at the guilt phase, Corin acknowledged that the jury would probably "find that the State has proved beyond a reasonable doubt each and every element of the crimes charged," but again reminded the jury that the trial was "not near over yet," because the second part of the trial was ahead, and promised that he would "give you reasons" why Respondent should not be sentenced to die. (TR 641-43, 673-74).[4]

At the two-day penalty-phase proceedings before the jury, Corin presented testimony from friends and family, from police officers, and from two mental health experts (a psychologist and a psychiatrist), along with school and institutional records and psychological reports dating back to 1972.

In his penalty-phase closing argument, Corin identified for the jury the mitigating circumstances he deemed established - Respondent's low intelligence, his brain damage, his troubles in school, his age, and his emotional disturbance and impaired capacity at the time of the murder (TR 1022-25). He reminded the jury of Respondent's cooperation with police following his arrest, of testimony that Respondent had been a "wild man" when he committed the murder, and of testimony that Respondent had fallen through "cracks" in the system (TR 1025-30). Corin noted that, while Respondent obviously had difficulty living on his own, the evidence showed that he functioned well in the structured environment of prison; thus, a death sentence was not necessary to protect society (TR 1036-38). Reminding the jury of the psychiatrist's testimony, Corin argued that the death penalty might be appropriate for an "intact human being," but Respondent was not, never had been, and never would be an intact human being." (TR 1040). He concluded by saying (TR 1040):

---

[4] It bears noting that, although counsel acknowledged that his client was "responsible" for the death of the victim, and that the jury would "probably" find his client guilty as charged, based on the evidence presented, counsel never expressly admitted that his client was guilty of first degree murder.

> You know, we're not around here all that long. And it's rare when we have the opportunity to give or take life. And you have that opportunity to give life. And I'm going to ask you to do that. Thank you.

On direct appeal, Respondent claimed he was denied effective assistance of counsel when Corin conceded Respondent's guilt and sought leniency at the penalty phase. The Florida Supreme Court remanded to the trial court for hearing on this issue.

At the hearing on remand, Corin testified that he had discussed with Nixon on more than one occasion that, should the state reject his plea offer, counsel's goal would be to save Respondent's life rather than to obtain an acquittal, and he would probably concede his guilt. Counsel testified that he had a good relationship with Respondent that preceded his arrest in this case, and Respondent never told him "not to do that." Supplemental record on appeal from the conviction at 47-54. The lead trial prosecutor testified that Corin's guilt-phase strategy forced the State to be cautious; the State still had to prove its case, but also had to avoid "engaging in overkill." *Id.* at 85. Therefore, the State withheld evidence that it otherwise would have presented. *Id.* at 87. The final witness was a board-certified criminal defense lawyer, who testified (*id.* at 102-03):

> This case involves a situation where . . . there was absolutely no doubt whatsoever that the Defendant Joe Nixon killed Jeanne Bickner. . . . What Mike Corin did was to recognize that this case was essentially one trial that may have had two phases that are involved in it. And what Mr. Corin did was to select the issue that really had to be tried in this case and try that issue. And, quite frankly, I don't think that there was a better strategy that could have been employed in the

defense of this case than the one that Mr. Corin employed.

The trial court found:

> 1. Trial Defense Counsel Corin reviewed with Defendant/Appellant Nixon the defense approach to the case in general terms including, but not limited to, the probability that he would concede the killing of the victim by Nixon.
>
> 2. Corin and Nixon had previous attorney-client relationships, both were veterans of the criminal justice system and although Nixon manifested no reaction, he understood what was to take place.
>
> 3. Nixon made no objection and did not protest the strategy and tactic employed at trial.
>
> Based on the foregoing, this Court concludes that the Defendant/Appellant Nixon has not sustained his burden of proof by the applicable standard that he (a) was neither informed nor knew of the trial strategy and tactic employed by Defense Trial Counsel Corin nor (b) did not consent thereto or (c) acquiesce therein.

Nixon v. State, 572 So.2d 1336, 1340 fn. 3 (1990) (Nixon I).

Because Respondent had invoked his attorney-client privilege to restrict the State's cross-examination of trial counsel, the Florida Supreme Court ultimately declined to "dispose of this claim" on direct appeal on the "present state of the record," and affirmed the convictions and sentences, including the death sentence, "without prejudice" to Respondent raising the issue by way of a Rule 3.850 motion for postconviction relief. Id. at 1340.

On October 7, 1993, Respondent filed a state rule 3.850 motion for postconviction relief alleging, inter alia, ineffective assistance of counsel in conceding guilt. The state trial court summarily denied Respondent's motion, rejecting Respondent's claim that "trial counsel's concession of guilt without an express waiver by Defendant on the record constitutes ineffective assistance of counsel per se under United States v. Cronic, 466 U.S. 648 (1984)," without any demonstration of prejudice. The trial court also rejected Nixon's alternative argument that his trial counsel was ineffective at the guilt phase under the two-part test of Strickland v. Washington, 466 U.S. 668 (1984). The trial court found that "defense counsel's concession of guilt" was an "acceptable defense strategy" in the circumstances of this case, and that Respondent had in any event failed to demonstrate prejudice.

The Florida Supreme Court, by a vote of 4-2, reversed. Nixon v. State, 758 So.2d 618 (Fla. 2000) (Nixon II)(A37-70). In the view of both the majority and dissenting opinions, the legal issue before the court was, as stated by Justice Wells in dissent:

> whether Nixon's claim of ineffective assistance of counsel is governed by the oft-applied test of Strickland or by dicta in Cronic, which suggests that an attorney, in remote instances, may act so detrimentally to his client's case as to result in a breakdown of the adversarial process and will be deemed prejudicial per se.

Nixon II, 758 So.2d at 631 (Wells, J., dissenting) (A62). The majority concluded that, unless Nixon explicitly consented to trial counsel's concession of guilt, Cronic applied. The court explained:

> We emphasize that the Strickland standard normally applies to ineffective assistance of counsel claims. Cronic only applies to the narrow spectrum of cases where the defendant was

> completely denied effective assistance of counsel. See Chadwick v. Green, 740 F.2d 897, 900 (11th Cir. 1984) .

Nixon II, 758 So.2d at 622 (A44). In the view of the majority, trial counsel's concession of guilt was tantamount to an abandonment of the defense of his client. Id. at 622-23 (A44-A46). And this was so notwithstanding the court's recognition "that in certain unique situations, counsel for the defense may make a tactical decision to admit guilt during the guilt phase in an effort to persuade the jury to spare the defendant's life during the penalty phase." Id. at 623 (A46). In the view of the majority of the Florida Supreme Court, the "dividing line" between sound defense strategy and ineffectiveness of counsel was whether the defendant had consented to such strategy. If he had not, trial counsel's performance was deficient, and this deficient performance was prejudicial per se. Ibid (A46-A47).

The court analogized the concession of guilt to a guilty plea. In the context of a guilty plea, the court noted, a knowing, intelligent, and voluntary waiver of the right to a jury trial must be shown. 758 So.2d at 624 (A48-A49) (citing Boykin v. Alabama, 395 U.S. 238) (1969). The court reasoned that counsel's comments in this case were the functional equivalent of a guilty plea" and that Nixon's claim of ineffective assistance of counsel "must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy." The court emphasized: "*Silent acquiescence is not enough.*" Nixon II, 758 So.2d at 624 (A49) (emphasis supplied). The court remanded for an evidentiary hearing to determine whether there was an "affirmative, explicit acceptance by Nixon of counsel's strategy;" if not, Nixon was entitled to a new trial. Nixon II, 758 So.2d at 624 (A49).

In elaboration, the court stated:

> We recognize that Nixon was very disruptive and uncooperative at trial. In light of this, as well as the overwhelming evidence in this case, it has been suggested that the strategy employed by Nixon's trial counsel represented Nixon's best chance of receiving a life sentence, and, therefore, counsel should not be faulted or deemed ineffective. Indeed, counsel's strategy may have been in Nixon's best interest. Nevertheless, the Supreme Court has made it clear that the defendant, not the attorney, is the captain of the ship. See Jones [v. Barnes, 463 U.S. 745, 751 (1983)]; Brookhart [v. Janis, 384 U.S. 1 (1966)]. Although the attorney can make some tactical decisions, the ultimate choice as to which direction to sail is left up to the defendant. The question is not whether the route taken was correct; rather, the question is whether Nixon approved of the course.
>
> It has also been suggested that absent this strategy, Nixon's counsel had no other options. We disagree. In every criminal case, a defense attorney can, at the very least, hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt. Without Nixon's consent to do otherwise, this should have been the strategy utilized by defense counsel. If this strategy worked to Nixon's detriment, Nixon himself must bear the responsibility for that decision.

Nixon II, 758 So.2d at 625 (A49-A50).

In concurrence, Chief Justice Harding, joined by two other members of the majority, explicitly recognized that trial counsel was competent and that his strategy in this case was an effective one, reasonably calculated to help Nixon avoid the death penalty:

> I do not question the competence of trial counsel. Neither do I underestimate the frustration counsel must have experienced with such a disruptive and uncooperative client. Nor do I question *that the strategy taken by defense counsel was an effective one reasonably calculated to help the defendant avoid the death penalty.*

Nixon II, 758 So.2d at 626 (A52-A53) (Harding, C.J. concurring, joined by Anstead and Pariente, JJ.) (emphasis supplied).

Dissenting Justice Wells also explicitly agreed that trial counsel's strategy was reasonable. 758 So.2d at 634 (A62) (Wells, J., dissenting). Justice Wells disagreed with the majority's application of Cronic to this case, noting that the majority's "expansive" interpretation of Cronic had been rejected by a number of federal circuit courts of appeal. Justice Wells analyzed this case as follows:

> What is plainly the reality of what we have here is a gruesome, horrible murder, confessed to by a competent but obstructive defendant who had experienced trial counsel who proceeded on the basis of a strategy which should be recognized as obviously the only rational legal strategy to try to keep a client out of the electric chair. I cannot join the majority in replacing this plain reality with a theoretical gloss that paints what occurred as if it were some hypothetical exercise which spurned constitutional rights. I cannot accept that our courts must ignore that which reasonable, objective analysis demonstrates is patently evident.

Nixon II, 758 So.2d at 631 (Wells, J., dissenting) (A62). In Justice Wells' view, the Cronic standard was applicable only when the defendant was denied any meaningful assistance of all, and this was not such a case:

> No fair reading of the instant record can lead to the conclusion that Nixon was "denied any meaningful assistance at all." Id. This case must be analyzed in light of Florida's death penalty procedure. Counsel's performance must necessarily consider both the guilt and penalty phases. The trial record demonstrates that counsel made a rational choice, one that a competent, experienced lawyer would be expected to make given the evidence, which was to call no witnesses and emphasize the penalty phase. . . .

Nixon II, 758 So.2d at 634 (Wells, J., dissenting) (A69).

The circuit court evidentiary hearing mandated by the Nixon II majority was conducted on May 11 2002. Trial counsel Corin once again testified that his strategy had been to save Respondent's life. He had explained that strategy to Respondent. May 11, 2002 evidentiary hearing at 426. He had been an a defense attorney since 1976, and had successfully represented Respondent previously to his capital murder trial. He and Respondent "got along fine," and Respondent understood the court proceedings. *Id.* at 436.

Corin testified that he had talked to and deposed numerous witnesses, as reflected by the copious notes he took. He had discussed "the state of the evidence" with Petitioner. At some point, he had explained to Respondent that his strategy would be to try to avoid the death penalty and not contest guilt. That strategic decision was not one he would have made "lightly" or without first discussing it with Respondent. He "owed it to my client to tell him what's going on." In Corin's "professional

opinion," based on the evidence in this case, such strategy was the "best way to proceed" and possibly the only way to save Respondent's life; if the question of guilt was not going to be a matter that could be the subject of "any reasonable dispute," then it would be much more effective, he testified, to attempt to save Respondent's life through mitigating circumstances at the penalty phase than "going through a trial and arguing things that were not going to make a whole lot of sense." However, he would not have pursued that strategy against Nixon's wishes. *Id.* at 438-46.

Corin testified that each case is different and each client is different; "you hope that you have clients that are cooperative," but if you do not, "[y]ou do the best you can" with "what you have," and you "represent them to the best of your ability." Corin testified that "many times lawyers make decisions because they have to make them because the client does nothing." Such was the case in Nixon's trial *Id.* at 452-55, 473.

The circuit court denied relief. On appeal, the Florida Supreme Court again reversed. Nixon v. State, 857 So.2d 172 (Fla. 2003)(A2-36) (Nixon III). Four justices joined the per curiam majority opinion; one justice concurred in the result only, and two justices dissented. After reiterating its holding in Nixon II, the majority explained its reversal as follows:

> In Nixon II, we found that counsel's comments at trial were the functional equivalent of a guilty plea. Since counsel's comments operated as a guilty plea, in order to affirm the trial court's ruling, the record must contain substantial evidence which would enable this Court to determine that Nixon did more than silently submit to counsel's strategy. There is no evidence that shows that Nixon affirmatively, explicitly agreed with counsel's strategy. The only evidence presented at the evidentiary hearing was Corin's testimony, which indicated that Nixon neither

> agreed nor disagreed with counsel's trial strategy. Thus, there is no competent, substantial evidence which establishes that Nixon affirmatively and explicitly agreed to counsel's strategy. Without a client's affirmative and explicit consent to a strategy of admitting guilt to the crime charged or a lesser included offense, counsel's duty is to "hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt." Nixon II, 758 So. 2d at 625 (emphasis added). Since we held in Nixon II that silent acquiescence to counsel's strategy is not sufficient, we find that Nixon must be given a new trial.

Nixon III (A8-A9).

Justice Lewis concurred in the result only; in his view, the majority decision was "both legally and logically incorrect," but its conclusion was compelled by the "law of the case" established in Nixon II (A14). Justices Wells and Shaw dissented, expressing the belief that the court's decision was "legally wrong." (A22).

Rehearing was sought by Petitioner, and was summarily denied October 1, 2003 (A1).

REASONS FOR GRANTING THE WRIT

THE CONCLUSION THAT TRIAL COUNSEL WAS INEFFECTIVE *PER SE* IN PURSUING AN EFFECTIVE STRATEGY ACQUIESCED TO BY THE DEFENDANT AND REASONABLY CALCULATED TO AVOID A DEATH SENTENCE, IS CONTRARY TO THIS COURT'S DECISIONS IN *STRICKLAND V. WASHINGTON*, *BELL V. CONE* AND *ROE V. FLORES-ORTEGA*, AND, AS WELL, TO LOWER FEDERAL COURT DECISIONS

A. Preliminary Statement

This case presents the question of the appropriate ineffective-assistance-of-counsel standard of review applicable to a concession of guilt by a defense counsel who, after fully investigating and preparing for a capital trial, and after fully informing his client and hearing no objection, has concluded that his client's best chance of avoiding a death sentence was not to contest the state's overwhelming evidence at the guilt phase in order to preserve the defense's credibility with the jury at the penalty phase. The Florida Supreme Court has concluded that, unless the defendant expressly agrees to such strategy, its adoption by defense counsel is *ineffective per se* regardless of the sufficiency of trial counsel's investigation and preparation or of the soundness of his strategic decision - all of which the Florida Supreme Court deems irrelevant. In that court's view, "silent acquiescence" of a fully informed defendant is not enough; instead, the defendant must "explicitly" consent, in words. Absent such explicit consent, trial counsel must contest guilt even if it works to his client's "detriment."

The Florida Supreme Court reached this conclusion by interweaving this Court's decision in United States v. Cronic, 466 U.S. 648 (1984), indicating that a defendant would be relieved of

his burden under Strickland to prove prejudice if he could establish that his trial counsel utterly failed to act as an advocate on his behalf, and Boykin v. Alabama, 395 U.S. 238 (1969), holding that a guilty plea may only be entered after the defendant himself has knowingly, intelligently and voluntarily waived his right to a trial. In the view of the Florida Supreme Court, trial counsel's concession of guilt was the functional equivalent of a guilty plea, and was tantamount to a complete failure to test the state's case, notwithstanding counsel's vigorous opposition to the state's case at the penalty phase.

The question of the appropriate ineffective-assistance-of-counsel standard applicable in cases in which counsel has conceded guilt to some degree has divided lower courts, both state and federal. The greater weight of authority, particularly in more recent authority, is to evaluate counsel's performance under the deficient-performance/actual-prejudice standard of Strickland rather than the presumed-prejudice standard of Cronic. The Florida Supreme Court applied the wrong standard, and its decision is contrary to this Court's precedents and is in conflict with similar decisions of the Eleventh Circuit Court of Appeals and other federal and state courts.

B. Boykin is inapplicable to argument by trial counsel

The court below acknowledged, in a death penalty case, it may be sound strategy for defense counsel to acknowledge the sufficiency of the state's proof at the guilt phase in an effort to persuade the jury to spare the defendant's life during the penalty phase. Nixon II, 758 So.2d at 623 (A46). As noted in Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299 (1983) (cited in Strickland v. Washington, supra, 466 U.S. at 662, fn. 32):

> In a death penalty case, . . . the possible punishment is so extraordinary that the defense attorney must consider from the outset the impact

that the guilt phase defense may have on sentencing. Since the capital case defense attorney may have to be an advocate both for acquittal and for life, she should not frame a defense case for acquittal which will preclude or handicap effective advocacy for life. Indeed, in a case where a severe conflict or inconsistency between advocacy for acquittal and advocacy for life exists, the defense attorney will be forced to make the difficult decision of preferring one over the other. *The relationship between this advocacy choice and the assessment of an attorney's competence in such cases cannot be overlooked in formulating standards of effective assistance in capital cases.*

> In many capital cases, the evidence of guilt is overwhelming. Such cases go to trial either because the prosecutor will not bargain for a sentence less than death or because the defendant will not accept a sentence of life imprisonment without the possibility of parole. In these cases, although the defendant will almost certainly be convicted, the defendant has nothing to lose by proceeding with a trial on the capital charges. However, *if the guilt phase is virtually indefensible, inappropriate guilt phase advocacy could so prejudice the sentencer that no persuasive case for a life sentence can be made at the sentencing phase.*

Id. at 329 (emphasis supplied). In this case, trial counsel was faced with a "virtually indefensible" guilt phase, and decided not to sacrifice his client's "best chance" with the jury by making arguments the jury was going to reject anyway, hoping to maximize his chances of making a persuasive case for a life sentence at the penalty phase. It has never been contested that trial counsel made a strategic decision, and a majority of the court

below concluded (or at least expressly assumed) not only that counsel made a strategic decision, but that counsel's strategic decision was effective and reasonably calculated to help Nixon avoid a death sentence.[5] Nevertheless, the Florida Supreme Court found that, absent explicit consent by Nixon to counsel's strategy, counsel was ineffective per se. The court reached this conclusion without finding *either* deficient attorney performance *or* prejudice. Instead, the court concluded that conceding guilt without the client's explicit consent is ineffective per se under Cronic no matter how uncooperative Nixon was, no matter how effective counsel's strategy may have been, no matter that Nixon did not affirmatively object to such strategy, and no matter what Nixon's best interests may have been.

Indeed, the Florida Supreme Court erred in reaching its conclusion in reliance upon this Court's decision in Boykin v. Alabama, 395 U.S. 238 (1969) (guilty plea may only be entered after the defendant himself has knowingly, intelligently and voluntarily waived his right to a trial), concluding that trial counsel's concession was the "functional equivalent of a guilty plea" and that the same waiver standard should therefore apply.

Strategic concessions of fact by trial counsel, however, cannot reasonably be deemed the functional equivalent of a guilty plea, as lower federal courts have held. See, e.g., U.S. v. Gomes, 177 F.3d 76, 84 (1st Cir. 1999). Gomes states: "[Appellant's] cursory analogy to a guilty plea without safeguards (including the explicit consent and participation of the defendant and a good many formalities as well, Fed.R.Crim.P 11) is a false one. Counsel's concession was not a guilty plea, which involves conviction without proof, and is therefore properly hedged with protections. Here the government had to provide a jury with

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[5] Three justices in the majority and one dissenter *explicitly* drew this conclusion; thus, a majority of the court explicitly found that trial counsel's strategy was reasonable and effective considering the circumstances of this death penalty trial.

admissible evidence of guilt and did so in abundance. [Appellant's] claim that Rule 11 was short-circuited is virtually identical to a claim squarely and properly rejected by the Seventh Circuit in Underwood v. Clark, 939 F.2d 473, 474 (7th Cir. 1991) (Posner, J.)." (Emphasis in original.)

As noted in Boykin itself, "a plea of guilty is more than an admission of conduct; it is a conviction." In this case, trial counsel's concession was not in itself a conviction. It was not even evidence. Regardless of his concession, the burden remained on the state to prove to the satisfaction of the jury beyond a reasonable doubt that Nixon was guilty, pursuant to the law as given to the jury in charge, and trial counsel never so much as hinted to the contrary. Counsel held the state to its burden of proof, even if he did not expressly contest it. Moreover, certain issues were preserved for appeal notwithstanding counsel's concession that would not have been preserved if Nixon had pled guilty, including appellate review for sufficiency of the evidence and appellate review of objections that trial counsel preserved for appeal, such as objections to the introduction of allegedly inflammatory photographs and to portions of the prosecutor's closing argument. Thus, trial counsel's concession was not "a conviction," and Boykin does not support the decision of the Florida Supreme Court to find ineffectiveness *per se* absent any demonstration of either deficient attorney performance or prejudice.[6]

The Florida Supreme Court supported its application of Boykin to concessions of guilt in reliance on, inter alia, three cases from other states in which trial counsel had conceded their clients'

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[6] As articulated, Boykin requires a guilty plea to be supported by a knowing waiver personally of the defendant's right to a trial. Trial counsel's effectiveness is measured by assessing the reasonableness of counsel's strategy based on the facts and circumstances of the case. While alluring to combine the two analyses, in fact, analysis of each is totally dissimilar and should be maintained as such.

guilt to lesser offenses either without discussing such concession with their clients, or over the clients' expressed objection. Nixon II, 758 So.2d at 623 (A 46), citing State v. Harbison, 337 S.E. 2d 504 (NC 1985) (in murder case, counsel conceded his client was guilty of manslaughter without first discussing such concession with client); State v. Anaya, 592 So.2d 1142 (N.H. 1991) (in first degree murder prosecution, counsel conceded his client was guilty of second degree murder over his client's expressed objection); Jones v. State, 877 P.2d 1052 (Nev. 1994) (same). Nixon's counsel, on the other hand, discussed his strategy with Nixon, and Nixon never objected to the pursuit of that strategy until after the trial was over.[7]

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[7] Since Nixon II was decided, the Florida Supreme Court has, in effect, rejected the very cases it relied upon to apply Boykin to concessions of guilt, when it decided in Atwater v. State, 788 So.2d 223 (Fla. 2001), that counsel was not ineffective per se for conceding (without first obtaining his client's consent) that his client was guilty of second degree murder. In Atwater, the Florida Supreme Court distinguished Nixon II on the ground that Atwater's counsel had only conceded his client's guilt to a lesser crime than charged. Boykin, however, allows for no relaxation of standards of waiver when a defendant pleads guilty to something less than all the crimes charged in the indictment. To the extent that the Florida Supreme Court in Nixon II adopted the test for evaluating concessions of guilt by trial counsel based on Boykin, that same test should be applicable to all concessions of guilt.

Despite its rejection of Atwater's claim of ineffectiveness per se, the Florida Supreme Court continues to apply its interwoven Cronic/Boykin rule, not only in the case at hand, when it concluded in Nixon III that Nixon II was the law of this case, but also to a case in which counsel did not concede guilt, but merely conceded certain irrefutable facts, which, counsel argued, did not establish his client's guilt of first degree murder. See Harvey v. State, 28 Fla. L. Weekly S513 (Fla. July 3, 2003) (because counsel conceded in the face of incontrovertible evidence that his client had discussed with his co-defendant whether to kill, he effectively conceded premeditation and thus was ineffective per se under Cronic/Boykin, despite his argument to the jury that the discussion was "frenzied" and that the killing was impulsive, not premeditated).

The principles adopted by the Florida Supreme Court in Nixon II and applied in Nixon III and in Harvey v. State, 28 Fla. L. Weekly S513 (Fla. July 3, 2003) are contrary to this Court's admonition in Strickland that counsel "owes the client a duty of loyalty." 466 U.S. at 688. Instead of evaluating counsel's performance for reasonableness under the circumstances, the Florida Supreme Court has established mechanical rules which counsel must follow, even if the client suffers. As this Court emphasized in Strickland, the "benchmark" for judging a claim of ineffectiveness is whether or not the trial can "be relied on as having produced a just result." 466 U.S. at 686. Ensuring such a just result cannot be accomplished by requiring counsel to adopt a strategy harmful to his client simply because he has an uncooperative client who refuses to choose a strategy.[8] Moreover, such requirement "would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." Id. at 689. The Florida Supreme Court erred in requiring counsel to adhere to mechanical rules regardless of the best interests of his client.

This Court should grant the writ to address and correct the conflict in authority on the application of Boykin to concessions of fact by trial counsel during trial.

C. Cronic does not contemplate both a presumption of prejudice and a presumption of deficient attorney performance and does not apply to strategic and reasonable concessions of guilt

Petitioner's contention is that trial counsel's strategic decision in this case is properly reviewed under the two part test

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[8] It is one thing to hold the defendant personally responsible for a strategy he has chosen; it is an altogether different matter to burden a defendant with the responsibility for a detrimental trial strategy he did not personally choose, which is what Nixon II does. See 758 So.2d at 625 (A49-50).

of Strickland v. Washington, supra, rather than under dicta in Cronic suggesting that, when trial counsel's performance is so lacking that it amounts to no meaningful assistance at all, a breakdown in the adversarial process has occurred which will be deemed prejudicial per se. The Florida Supreme Court failed to recognize or give sufficient weight to the reality that, in a death penalty trial, the most important issue may not be guilt but sentence.[9] In a capital case in which the evidence of guilt is overwhelming, a defendant simply has not been "denied any meaningful assistance of counsel at all" when his attorney decides after reasonable investigation not to contest guilt in order to maximize defense credibility at the penalty phase and maximize the defendant's chances of being sentenced to life rather than death, and Cronic should not apply.

The decision of the Florida Supreme Court is contrary to this Court's recent decision in Bell v. Cone, 535 U.S. 685 (2002), in which this Court held that a trial counsel's failure to test the state's case at "specific points" is insufficient to relieve the defendant of his burden to prove both deficient attorney performance *and* prejudice. In this case, although counsel did not dispute that his client was guilty of a crime for which the death penalty *could* be imposed, he vigorously disputed that his client was guilty of a crime for which a death penalty *should* be imposed. In other words, counsel disputed that his client was guilty of capital murder. Thus, it simply cannot be said that trial counsel's concession of guilt was a "complete" failure to test the state's case, as is required for Cronic to apply.[10]

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[9] See Goodpaster, supra at 338: "The major action in capital cases no longer necessarily takes place at the guilt trial. Penalty trials are not ordinary sentencing hearings; they are complete trials on a crucial issue - life - and counsel and courts must so view them."

[10] Bell v. Cone was decided after Nixon II, but before Nixon III. Although Petitioner cited and relied on Bell v. Cone in its brief on the Nixon III appeal, the Florida Supreme Court's Nixon III opinion nowhere acknowledges the existence of Bell v. Cone.

Two of the federal cases on which the Florida Supreme Court relied, United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991) and Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981), were not capital prosecutions and the courts found that trial counsel had no sufficient reason to concede guilt.[11] Here, the Florida Supreme Court conceded that trial counsel's performance was not only strategic, but effective, but still applied Cronic. Where, as here, trial counsel's concession is the product of a strategic choice made in the defendant's best interest after full investigation and preparation, counsel's concession of guilt should be analyzed under the two part test of Strickland, to determine whether trial counsel's performance was (a) deficient and (b) prejudicial.[12]

As noted in Justice Wells' dissenting opinion in Nixon II, the federal circuit courts of appeal have been divided in their

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[11] The Swanson court noted that the government had failed to identify any strategy that could have justified trial counsel's concession of guilt. In Wiley, the state did argue that counsel's goal was to obtain leniency in sentencing; however, the circuit court did not find this to have been reasonable strategy absent any evidence that counsel's guilt-phase strategy contributed to his sentencing strategy. It should be noted that Wiley pre-dated Strickland and Cronic and that it was still an open question at the time whether a defendant had any burden to prove prejudice on any kind of ineffectiveness claim; further, the court found that in light of the weakness of the state's case of guilt, counsel's concession of guilt *was* prejudicial.

A third federal case relied on by the Florida Supreme Court, Osborne v. Shillinger, 861 F.2d 612 (10th Cir. 1988), was a death penalty case, but in that case the defendant had pled guilty; the court found that counsel had abandoned his duty of loyalty to his client, had failed to investigate, had no strategic reason for opposing his clients' attempt to withdraw his guilty plea or for the comments he made at the penalty phase which essentially conceded the propriety of a death sentence for his client. In fact, the court did analyze the case under Strickland, although the court also concluded in addition that counsel had so abandoned his duty to his client that Cronic probably applied.

[12] Defense counsel often concede that the defendant is guilty of some crime, even if they dispute that the defendant is guilty of the most serious crime charged.

interpretation of Cronic where trial counsel has conceded or failed vigorously to contest guilt. Both the Fifth and First Circuit Courts of Appeal have criticized decisions of the Ninth and Tenth Circuits, concluding that these cases have misperceived the rationale underlying Cronic and that the concession of guilt in closing argument appears to be a trial-type error amenable to a Strickland analysis. Scarpa v. DuBois, 38 F.3d 1 (1st Cir. 1994); Childress v. Johnson, 103 F.3d 1221 (5th Cir. 1997). Other federal courts have simply applied a Strickland analysis to such claims. See, e.g., Lobosco v. Thomas, 928 F.2d 1054, 1056-58 (11th Cir. 1991) (claim of ineffectiveness of counsel in regard to counsel's concession of guilt in closing argument analyzed and rejected under Strickland); United States v. Sanchez, 790 F.2d 245, 253-54 (2nd Cir. 1986) (claim of ineffective assistance of counsel analyzed and rejected under Strickland, where defense counsel largely adopted strategy of silence and where defendant absented himself from proceedings and failed to consult with attorney).

The standard adopted in Nixon II and applied in Nixon III is in direct conflict with Parker v. Head, 244 F.3d 831 (11th Cir.), *cert. denied*, 543 U.S. 1046 (2001).[13] Parker's counsel had "admitted to the jury during opening and closing arguments that [Parker] was in fact guilty of murder as charged in the indictment." Parker v. Turpin, 60 F.Supp. 1332, 1341 (N.D. Ga. 1999). Parker argued on postconviction that his trial counsel was ineffective *per se* under Cronic for conceding that his client was guilty of murder. The District Court analyzed Cronic as follows:

> In Cronic, the United States Supreme Court stated in a footnote, "[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable

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[13] Parker v. Head was decided after Nixon II, but before Nixon III. Although Petitioner cited and relied on Parker in its brief on the Nixon III appeal, the Florida Supreme Court's Nixon III opinion ignores Parker.

doubt." 466 U.S. at 656, n. 19, 104 S.Ct. At 2045. This statement does not prohibit counsel from admitting on behalf of the defendant to any facts charged in the indictment. The statement which immediately precedes the aforementioned comment is equally as important. As in the case at bar, the Supreme Court stated, "If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." Id. . . .

> [T]here is no per se rule prohibiting counsel from admitting to facts related to one or all of the crimes charged in spite of entering a plea of not guilty. Counsel's statements made in argument do not amount to a stipulation of guilt or the entry of a guilty plea. . . .
>
> Since the decision in Cronic, the Eleventh Circuit has limited its applicability to cases in which "circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all." Vines v. U.S., 28 F.3d 1123, 1128 n. 8 (11th Cir. 1994) (quoting Chadwick v. Green, 740 F.2d 897, 901 (11th Cri. 1984).). . . .
>
> The record clearly establishes that counsel admitted to causing the death of the victim in order to maintain credibility with the jury for the purpose of avoiding the death sentence. Employing such a legal tactic does not constitute representation which falls below an objective standard of reasonableness.

Parker v. Turpin, supra, 60 F. Supp. at 1342-43. The Eleventh Circuit affirmed, concluding that the state court's rejection of

Parker's Cronic claim was not "contrary to, or an unreasonable application of, the Strickland standard," and that the district court had not erred "in concluding that Parker failed to show the prejudice required under Strickland." 244 F.3d at 840.

Resolution of the conflict in the federal courts, and, as well, the conflict between the decision of the Florida Supreme Court and the Eleventh Circuit's Parker decision, is a valid basis for this Court to grant certiorari in this case. However, Petitioner would note, additionally, that state courts have reached conflicting results on this issue. *Compare* State v. Harbison, 337 S.E. 2d 504 (N.C. 1985) ("when counsel admits his client's guilt without first obtaining the client's consent, the client's right to a fair trial and to put the State to the burden of proof are completely swept away") *with*: Thompson v. State, 915 S.W.2d 897, 902-05 (Tex. App. 1996) (defense counsel's admission of defendant's guilt at voir dire and closing argument at guilt phase analyzed and rejected under Strickland), and People v. Johnson, 538 N.E.2d 1118, 1124-25 (Ill 1989) (court rejected argument that is it per se ineffectiveness whenever defense attorney concedes guilt to offenses in which there is overwhelming evidence of guilt but fails to show on the record consent by defendant).

Cronic holds that, in some cases, constitutionally deficient performance by counsel may be so pervasive that prejudice may be presumed, because "prejudice to the accused" is "so likely that the cost of litigating their effect" is "unjustified." 466 U.S. at 658. But this is not a case involving deficient attorney performance at all. On the contrary, a majority of the Florida Supreme Court determined that Nixon's trial counsel was competent and chose a strategy that was "effective" and "reasonably designed to help the defendant avoid the death penalty," but found that counsel's choice of strategy would be constitutionally deficient no matter how reasonable and effective it might have been unless it was expressly agreed to, in words, by Nixon, and then has further presumed prejudice. As a consequence, Nixon has obtained relief without showing either that his counsel's investigation, preparation or

strategy were not the "result of reasonable professional judgment," Strickland, 466 U.S. at 690, or that the strategy counsel adopted was prejudicial. Nothing in Cronic, however, contemplates presuming both components of the Strickland test for ineffective assistance of counsel, or presuming that trial counsel's performance is constitutionally deficient even though he has conducted a reasonable investigation and chosen a reasonable trial strategy based upon that investigation.

This would be a different case if Nixon's trial counsel had responded to his difficult client by just throwing up his hands in frustration and doing nothing, or if he had actively betrayed his duty of loyalty to his client by choosing a strategy he knew to be counter to his client's best interests. But there has been no demonstration in this case that the performance of Nixon's trial counsel was objectively unreasonable, or that he ever abandoned his duty of loyalty to his client, or that he failed to pursue what he believed to be the best possible course of action under the circumstances confronting him. On the contrary, the record shows that counsel prepared extensively for Nixon's trial, deposing more than 50 witnesses (and talking to additional potential defense witnesses, including family members, without deposing them), securing the services of two mental health experts (a psychiatrist and a clinical psychologist, each of whom testified that Florida's two statutory mental health mitigators applied), and securing and presenting school and institutional records demonstrating mental and emotional deficiencies dating back at least to age 10. Counsel knew exactly what the case was about; the problem for counsel was that the evidence (which included no less than seven different confessions to friends, family and law enforcement) was overwhelming and that the murder was a highly aggravated one. Trial counsel acted in pursuit of his client's best interests, focusing on the real issue in this case - that of sentence - by presenting defense evidence and argument designed to reduce Nixon's moral culpability for this brutal murder based on his mental and emotional deficiencies.

This is not a case in which trial counsel's strategic choices are invalid because counsel failed to conduct a reasonable investigation, as in Wiggins v. Smith, 123 S.Ct. 2527 (2003). Moreover, even in such cases, whether a defendant has received competent representation by his counsel must be analyzed under Strickland's deficient-performance/actual-prejudice standard. Nixon is entitled to no more. Cronic presents the wrong standard for analysis and is inapplicable here. This Court should grant the writ to resolve the conflict between its decisions and the decision of the Florida Supreme Court.

D. The Florida Supreme Court's insistence on a formal waiver is contrary to federal precedent

It is undisputed in this case that Nixon not only failed to state an objection on the record to his trial counsel's adopted strategy, but has never presented any evidence to show that he disagreed with that strategy at the time of the trial, much less that his will was "overborne" by his trial counsel. On the contrary, trial counsel's unrebutted testimony was that (a) Nixon was willing to plead guilty in exchange for a life sentence; (b) when the State rejected Nixon's plea offer, counsel decided that not to contest the State's case for guilt, without expressly conceding guilt of first degree murder by plea or otherwise; (c) counsel informed Nixon of his planned strategy; (d) Nixon never objected; and, finally, (e) if Nixon had objected to counsel's proposed strategy, counsel would not have pursued it. The Florida Supreme Court did not reject these conclusions, but simply found them insufficient, holding that trial counsel was ineffective *per se* if counsel did not obtain Nixon's "affirmative, explicit" consent to counsel's strategy. In the view of the Florida Supreme Court, Nixon's "silent acquiescence" was not enough to bring counsel's performance outside the ambit of Cronic.

This insistence on an explicit consent to counsel's strategy conflicts with Dean v. Superintendent, 93 F.3d 58, 61-62 (2d Cir. 1996) (even assuming that the Constitution precluded trial counsel

from imposing an insanity defense on an unwilling defendant, the right would be "subjected to practical constraints"; a defendant who did not object on the record at trial but later claimed that his counsel's presentation of an insanity defense violated his personal right not to present such a defense, must show not only that he "disagreed" with the strategy adopted by his trial counsel, but that his "will was 'overborne' by his counsel").

The decision below, and its insistence on formal waivers, is likewise inconsistent with Taylor v. United States, 287 F.3d 658 (7th Cir. 2002) (generally, "formal waivers are not essential to voluntary decisions; [n]othing in the Constitution or any decision of the Supreme Court justifies meddling in the attorney-client relationship by requiring advice to be given in a specific form or compelling the lawyer to obtain a formal waiver").

The decision below, and its insistence on *explicit, verbal* waiver, is also inconsistent with this Court's decision in North Carolina v. Butler, 441 U.S. 369 (1979) (while presuming waiver from a silent record is impermissible, "[t]hat does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights").

Further, the decision below, which, in a postconviction proceeding, effectively places the burden on the State to demonstrate that Nixon explicitly agreed with his trial counsel's strategy, is inconsistent with this Court's decisions in U.S. v. Timmreck, 441 U.S. 780 (1979) ("concern for finality" served by limitations on collateral attack "has special force with respect to convictions based on guilty pleas"), and U.S. v. Vonn, 535 U.S. 55 (2002) (defendant's failure to object to plea procedures at trial is a waiver of objection absent plain error; where a defendant fails to speak up "when a mistake can be fixed," it is not unfair to place the burden of proving prejudice on the defendant).

Finally, the decision of the Florida Supreme Court is inconsistent with, and contrary to, this Court's recent decision in Roe v. Flores-Ortega, 528 U.S.470 (2000), in which this Court rejected the Ninth Circuit Court of Appeals' "bright line" rule that, in order to establish ineffective assistance of counsel in failing to file a notice of appeal, a habeas petitioner "need only show that his counsel's failure to file a notice of appeal *was without the petitioner's consent*," in favor of a more case-specific analysis as required by Strickland v. Washington, concluding that ay other course would be inconsistent with Strickland's rejection of "mechanistic rules governing what counsel must do." 528 U.S. at 479.[14]

In the instant case, the Florida Supreme Court held that consultation and acquiescence was not enough. Instead, the Florida Supreme Court applied a *per se* rule that, absent Nixon's explicit consent to counsel's guilt-phase strategy, counsel was constitutionally ineffective. This is the imposition of exactly the kind of "mechanical rules on counsel" which this Court rejected in Strickland and Roe. 528 U.S. at 481.

CONCLUSION

The Florida Supreme Court failed to analyze counsel's performance under Strickland and to require Nixon to establish (1) deficient attorney performance considering all the circumstances, and (2) actual prejudice. Instead, the Florida Supreme Court undertook neither part of the Strickland inquiry, but analyzed this case under Cronic. The Florida Supreme Court failed to give any deference to trial counsel's "strategic choices" or to his evaluation of the risks of contesting guilt when the evidence of guilt was overwhelming and the issue of sentence would be litigated before the same jury who would have heard the evidence and decided the issue of guilt. Nor did the court properly consider other facts and

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[14] Roe v. Flores-Ortega is another case ignored by the Florida Supreme Court in Nixon III.

circumstances of the case, including the client's expressed willingness to plead guilty in exchange for a life sentence.

This Court should grant a Writ of Certiorari and summarily reverse for reconsideration in light of Bell v. Cone and Roe v. Flores-Ortega.

Respectfully submitted,

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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

State of Florida, *Petitioner*,

v.

Joe Elton Nixon, *Respondent.*

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Supreme Court of Florida

WEDNESDAY, OCTOBER 1, 2003

CASE NOS.: SC01-2486; 92006;
SC93192
Lower Tribunal No.: 84-2324-CF

JOE ELTON NIXON vs. STATE OF FLORIDA
JOE ELTON NIXON vs. JAMES V. CROSBY, JR., ETC.

Appellant/Petitioner Appellee/Respondent

Appellee/Respondent's Motion for Rehearing is hereby denied.

ANSTEAD, C.J., PARIENTE, LEWIS, QUINCE and CANTERO, JJ., concur.
WELLS and SHAW, Senior Justice, dissent.

A True Copy
Test:

_____
Thomas D. Hall
Clerk, Supreme Court

tc
Served:

EDDIE D. EVANS
ARMANDO GARCIA
ERIC M. FREEDMAN
CURTIS M. FRENCH
HON. BOB INZER, CLERK
HON. JANET E. FERRIS, JUDGE

SUPREME COURT OF FLORIDA

Nos. SC92006, SC93192 & SC01-2486

JOE ELTON NIXON,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

JOE ELTON NIXON,
Petitioner,

vs.

JAMES V. CROSBY, JR., etc.,
Respondent.

JOE ELTON NIXON,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[July 10, 2003]

PER CURIAM.

Joe Elton Nixon, a prisoner under a sentence of death, appeals an order of the trial court denying his motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. Additionally, he files a petition for writ of habeas corpus with this Court. We have jurisdiction. See art. V, § 3(b)(1),(9), Fla. Const. For the reasons that follow, we remand this case to the trial court for a new trial.

FACTS AND PROCEDURAL HISTORY

Joe Elton Nixon was charged, convicted, and sentenced to death for the 1984 murder of a Tallahassee woman. This Court affirmed the conviction and sentence on direct appeal. See Nixon v. State, 572 So.2d 1336 (Fla. 1990).[1] The United States Supreme Court denied Nixon's petition for a writ of certiorari. See Nixon v. Florida, 502 U.S. 854 (1991). Subsequently, in 1993, Nixon filed a rule 3.850 motion, which the trial court denied without an evidentiary hearing. Nixon appealed the trial court's summary denial of his 3.850 motion to this Court. Additionally, Nixon filed a petition for a writ of habeas corpus with this Court. Nixon raised seven issues relating to the denial of his rule 3.850 motion[2] and

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[1] Hereinafter referred to as Nixon I.

[2] The issues raised in Nixon's appeal of the denial of his 3.850 motion were: (1) whether the circuit court denied him a full and fair hearing on his ineffective assistance of counsel claim; (2) whether he was denied his right not to be tried while mentally incompetent; (3) whether his death sentence had to be set aside because his counsel failed to make an effective argument for sparing his life and presented evidence that was harmful to his case during the sentencing phase of the trial; (4) whether he was denied a competent mental health evaluation in violation of Ake v. Oklahoma, 470 U.S. 68 (1985); (5) whether he was entitled to prove his claims under Johnson v. Mississippi, 486U.S. 578 (1988), that the two prior convictions used as aggravating circumstances lacked validity; (6) whether he should have the opportunity to prove that race discrimination tainted his conviction and death sentence; and (7) whether the jury weighed invalid and unconstitutionally vague aggravating circumstances in violation of James v. State, 615 So.2d 668 (Fla. 1993), and Jackson v. State, 648 So.2d 85 (Fla. 1994).

three issues in his habeas petition.[3] See Nixon v. Singletary, 758 So.2d 618 (Fla. 2000).[4]

In Nixon II, this Court found Nixon's claim that he was denied the effective assistance of counsel when his lawyer conceded guilt without his consent to be the primary issue in the case. Nixon's counsel made the following statement during opening argument of the guilt phase:

> In this case, there will be no question that Jeannie [sic] Bickner died a horrible, horrible, death. Surely she did and that will be shown to you. In fact, that horrible tragedy will be proved to your satisfaction beyond any reasonable doubt. In this case, there won't be any question, none, whatsoever, that my client, Joe Elton Nixon, caused Jeannie [sic] Bickner's death. Likewise, that fact will be proved to your satisfaction beyond any reasonable doubt. This case is about the death of Joe Elton Nixon and whether it should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement.

Nixon, 758 So.2d at 620.

During closing argument, Nixon's counsel made the following statement:

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[3] In his habeas petition Nixon argued that: (1) appellate counsel failed to raise on direct appeal any issue regarding Nixon's competency to stand trial; (2) appellate counsel failed to properly preserve Nixon's claims under Ake v. Oklahoma; and (3) appellate counsel failed to properly preserve Nixon's claims under James v. State and Jackson v. State.

[4] Hereinafter referred to as Nixon II.

> Ladies and gentlemen of the jury, I wish I could stand before you and argue that what happened wasn't caused by Mr. Nixon, but we all know better. For several very obvious and apparent reasons, you have been and will continue to be involved in a very uniquely tragic case. In just a little while Judge Hall will give you some verdict forms that have been prepared. He'll give you some instructions on how to deliberate this case. After you've gotten those forms and you've elected your foreperson and you've done what you must do, you will sign those forms. I know you are not going to take this duty lightly, and I know what you will decide will be unanimous. I think that what you will decide is that the State of Florida, Mr. Hankinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson.

Id.

On appeal, the parties were in disagreement regarding the appropriate standard of review to be applied in this case. The State argued that the standard explained in Strickland v. Washington, 466 U.S. 668 (1984), should be applied, whereas Nixon argued that because counsel's concessions amounted to per se ineffective assistance of counsel, the United States v. Cronic, 466 U.S. 648 (1984), standard was the proper test. Ultimately, this Court held that if Nixon could establish that he did not consent to counsel's strategy, then the Court would find counsel to be per se ineffective under the Cronic standard. This Court reasoned that the Cronic standard should apply because:

> Although statements made by attorneys in closing arguments are not evidence, nevertheless, for all practical purposes, counsel's admission of guilt on behalf of his client denied to petitioner his constitutional right to have his guilt or innocence decided by the jury. Petitioner, in pleading not guilty, was entitled to have the issue of his guilt or innocence presented to the jury as an adversarial issue. Counsel's complete concession of petitioner's guilt nullified the adversarial quality of this fundamental issue.

Nixon, 758 So.2d at 623 (quoting Wiley v. Sowders, 647 F.2d 642, 650 (6th Cir. 1981)). Since counsel's comments operated as the "fundamental equivalent of a guilty plea," this Court concluded that "Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon's of counsel's strategy. Silent acquiescence is not enough." Id. at 624. To avoid similar problems in the future, this Court said:

> [W]e hold that if a trial judge ever suspects that a similar strategy is being attempted by counsel for the defense, the judge should stop the proceedings and question the defendant on the record as to whether or not he or she consents to counsel's strategy. This will ensure that the defendant has in fact intelligently and voluntarily consented to counsel's strategy of conceding guilt.

Id. at 625 (citations omitted). Accordingly, we remanded the case to the trial court to hold an evidentiary hearing on the issue of whether Nixon consented to trial counsel's strategy.[5]

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[5] This Court declined to address the remaining issues in Nixon's 3.850 appeal. Additionally, this Court opted not to address Nixon's habeas claims given its disposition of his 3.850 appeal.

On remand, an evidentiary hearing was held before Judge Janet Ferris on May 11, 2001. Although Nixon was present at the evidentiary hearing, he did not testify; the only witness presented was Michael Corin, Nixon's trial counsel. After the hearing, the trial court denied relief and found that Nixon consented to counsel's strategy. This appeal followed.[6]

LAW AND ANALYSIS

The dispositive issue is whether Nixon is entitled to a new trial under this Court's decision in Nixon II. In reaching the merits of his issue, this Court must decide whether there is competent, substantial evidence to support the trial court's conclusion that Nixon consented to trial counsel's strategy of conceding guilt.[7] In Nixon II, this Court directed the trial court to conduct an evidentiary hearing to determine whether evidence existed which indicated an "affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough." 758 So.2d at 624. Nixon never testified at the evidentiary hearing on this issue. On direct examination, trial counsel repeatedly testified that Nixon did nothing when asked his opinion regarding this trial strategy:

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[6] This appeal includes not only the Strickland/Cronic issue but also the even issues not addressed in Nixon II. Because we grant relief on the ineffective assistance of counsel claim, we do not address the other issues or the claims raised in the habeas petition.

[7] Generally, our standard of review following a denial of a 3.850 claim after holding an evidentiary hearing affords deference to the trial court's factual findings. "As long as the trial court's findings are supported by competent substantial evidence, this Court will not 'substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" McLin v. State, 827 So.2d 948, 954 n.4 (Fla. 2002) (quoting Blanco v. State, 702 So.2d 1250, 1252 (Fla. 1997)).

Q: [Nixon's Postconviction Counsel] Did you discuss the strategy of not contesting guilt with the defendant?

A: [Corin] I though I answered it. But if I didn't answer it, then yes, he was advised as to that, yes.

Q: And how did he respond?

A: To the best of my knowledge, again he did nothing, except after it occurred that he was not real pleased. And I think I answered that before also.

Q: Now what do you mean by he did nothing?

A: He did nothing. I don't know. I don't know what else I can say, Mr. Evans, I have said it before.

Corin further testified that Nixon provided neither verbal nor nonverbal indication that he did or did not wish to pursue counsel's strategy of conceding guilt.[8] Thus, at most, this testimony demonstrates silent acquiescence by Nixon to counsel's strategy.

The trial court indicated that it would consider the totality of the circumstances in making a determination of whether Nixon affirmatively and explicitly agreed to counsel's strategy of conceding guilt to the charged crime. The court in its written order noted that one of the factors that needed to be examined was the general pattern of Corin's interactions and communications with

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[8] Corin's testimony essentially mirrored his testimony given at the December 19, 1988, evidentiary hearing, at which Nixon invoked the attorney-client privilege. Thus, both the direct and cross-examination of Corin were extremely limited. Nonetheless, at that hearing Corin testified that Nixon did not affirmatively agree to his concession of guilt. Corin also testified that Nixon did not do or say anything to demonstrate his approval of the trial strategy.

Nixon. After reviewing the trial record, Nixon I and Nixon II, the transcript of the evidentiary hearing conducted on December 19, 1988, and Corin's testimony at the May 11, 2001, evidentiary hearing, the trial court found that Nixon's pattern of interactions with counsel involved information being provided by Corin, followed by silence from Nixon. In essence, the trial court found that Nixon's failure to approve or disapprove verbally was approval of counsel's strategy.

In Nixon II, we found that counsel's comments at trial were the functional equivalent of a guilty plea. Since counsel's comments operated as a guilty plea, in order to affirm the trial court's ruling, the record must contain substantial evidence which would enable this Court to determine that Nixon did more than silently submit to counsel's strategy. The only evidence presented at the evidentiary hearing was Corin's testimony, which indicated that Nixon neither agreed nor disagreed with counsel's trial strategy. Thus, there is no competent, substantial evidence which establishes that Nixon affirmatively and explicitly agreed to counsel's strategy. Without a client's affirmative and explicit consent to a strategy of admitting guilt to the crime charged or a lesser included offense, counsel's duty is to "hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt." Nixon II, 758 So.2d at 625 (emphasis added). Since we held in Nixon II that silent acquiescence to counsel's strategy is not sufficient, we find that Nixon must be given a new trial.

CONCLUSION

Accordingly, for the reasons stated in this opinion in Nixon II, we reverse the trial court's denial of postconviction relief and remand for a new trial. In light of our disposition of Nixon's rule 3.850 appeal, Nixon's habeas corpus petition is dismissed as moot.

It is so ordered.

ANSTEAD, C.J., and PARIENTE, QUINCE, and CANTERO, JJ., concur.
ANSTEAD, C.J., concurs specially with an opinion, in which PARIENTE and QUINCE, JJ., concur.
LEWIS, J., concurs in result only with an opinion.
WELLS, J., dissents with an opinion, in which SHAW, Senior Justice, concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

ANSTEAD, J., specially concurring.

I concur in the majority opinion because it simply reaffirms a fundamental principle long ago established by the United States Supreme Court and consistently adhered to by courts, that counsel cannot enter a plea of guilty to a criminal indictment without the express consent of the defendant. See Jones v. Barnes, 463 U.S. 745, 751 (1983) ("[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, [such] as . . . whether to plead guilty . . . ."); Boykin v. Alabama, 395 U.S. 238, 242-44 (1969) (recognizing that a defendant's decision to plead guilty involves the simultaneous waiver of several constitutional rights and, hence, waiver must be knowingly and voluntarily made by defendant); Brookhart v. Janis, 384 U.S. 1, 7-8 (1966) (holding that attorney does not have the power to enter a plea of guilty or to admit guilt "in effect" where the defendant has not consented to such a strategy); Sistrunk v. Vaughn, 96 F.3d 666, 670 (3rd Cir. 1996) ("[C]ertain litigation decisions are considered 'fundamental' and are for the client to make. These include decisions on whether to plead guilty, whether to testify, and whether to take an appeal."); Johnson v. Duckworth, 793 F.2d 898, 900 (7th Cir. 1986) ("[T]he decision to plead guity is one that must be made by the defendant, and is not one in which an attorney may speak for his client without consultation."); Wiley v. Sowders, 647 F.2d 642, 650 (6th Cir 1981) ("Unquestionably, the constitutional right of a criminal defendant to plead 'not guilty,' or perhaps more accurately not to plead guilty,

entails the obligation of his attorney to structure the trial of the cae around his client's plea."); Childers v. State, 782 So.2d 513, 517 (Fla. 1st DCA 2001) ("It is well established that an attorney may not concede guilt for any crimes to which the defendant had pled 'not guilty' unless the court finds that the defendant understands the consequences of the concession, because it is the functional equivalent of a guilty plea."); Taylor v. State, 695 So.2d 1293, 1295 (Fla. 5th DCA 1997) ("While counsel may believe it tactically wise to stipulate to a particular element of a charge or to issues of proof, an attorney may not stipulate to facts which amount to the 'functional equivalent' of a guilty plea without [the defendant's] consent.").

This fundamental principle is so firmly established that we have long ago incorporated it into an explicit and mandatory rule of criminal procedure. See Fla.R.Crim.P. 3.171(c)(1) ("Defense counsel shall not conclude any plea agreement on behalf of a defendant-client without the client's full and complete consent thereto, being certain that any decision to plead guilty or nolo contendere is made by the defendant."); see also Fed.R.Crim.P. 11 (requiring court to conduct inquiry of defendant wishing to plead guilty on the record to ensure defendant knows consequences of such plea); ABA Standards for Crim. Justice, Std. 4-5.2 (3d ed. 1993) (stating that what pleas to enter and whether to accept a plea are ultimately decisions to be made by the accused after receiving full and careful advice from counsel).

Of course, this fundamental principle applies equally to the most heinous offenses as well as those of a less serious nature. Further, while the delay in the resolution of this case should be cause for concern, it is apparent that a significant portion of that delay has been caused by either the failure to apply this principle at the trial level, or out of concern that the State be given every opportunity to demonstrate that the defendant did agree to allow his counsel to admit his guilt to capital murder. We have explicitly denied the defendant any privilege to prevent his counsel from

testifying about the defendant's consent to counsel's admission of guilt to capital murder.

When we previously reviewed this case, Justice Harding wrote an opinion that continues to provide a compelling explanation for our adherence to this fundamental principle:

> Prior to this nation's birth, the colonists were subjected to a system of government that denied individual rights and liberties and failed to provide due process. Based on their experience with the English monarchy and its courts, the founders of this country were determined to ensure that a number of individual rights and liberties were specifically provided for within the body of the Constitution. Today these rights include the right to have effective assistance of counsel in criminal matters, the right against self-incrimination, the right to an impartial jury, the right to a fair trial, the right to confront one's accusers, the right to be presumed innocence until proven guilty, and the right that the government prove a criminal matter beyond a reasonable doubt. These rights are available to all citizens, regardless of race, creed, or social status. History has shown that it is only when due process is strictly adhered to that judicial outcomes are credible. It has been said a number of times that it is more important that no innocent man be convicted than a guilty man go free. See In re Winship, 397 U.S. 358, 372, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Harlan, Jr., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free."); Furman v. Georgia, 408 U.S. 238, 367 n. 158, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Marshall, J., concurring) ("[I]t is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned.") (quoting

William O. Douglas, Foreward to Jerome Frank & Barbara Frank, Not Guilty 11-12 (1957)).

I share and understand the frustration of my colleagues in dissent. This is a difficult case for several reasons, not the least of which is the substantial evidence of the defendant's guilt. I do not question the competence or experience of trial counsel. Neither do I underestimate the frustration counsel may have experienced with such a disruptive and uncooperative client. Nor do I question that the strategy taken by defense counsel was an effective one reasonably calculated to help the defendant avoid the death penalty. Yet, I cannot accept that substantial evidence of guilt, a disruptive client, and an effective trial strategy can preempt the constitutional right of a defendant to the presumption of innocence and the requirement that a guilty plea be knowingly and intelligently entered. A plea of guilty cannot be entered to a judge or a jury without the defendant's consent. It is not a theoretical gloss or a hypothetical exercise to require that a defendant, no matter how gruesome or horrible his crime, how guilty he is, or how good the trial strategy, be accorded those rights. The courts have consistently required a judge to make inquiry and determine that a guilty plea is voluntarily, intelligently, and freely entered. We have developed a detailed rule setting forth specific procedures that courts must follow in making this determination. See Fla.R.Crim.P. 3.172. My research has not revealed a case where the failure to ensure that a defendant's plea of guilty was voluntary and intelligently entered was error subject to a harmless error analysis.

> In the absence of certain knowledge of whether Nixon consented to counsel's strategy, the process for determining guilt or innocence was utterly flawed in this case. If Nixon did not consent, then a number of his constitutional rights were violated: he did not have a fair trial, he did not have effective representation, he was not seen as innocent until proven guilty, and the government was not held to its burden of establishing its case beyond a reasonable doubt. Despite his difficult behavior, Nixon was still entitled to his constitutional rights. Without the benefit of these rights, we can place no credence in the jury's verdict of guilt in this case. Any other conclusion would rend the very fabric from which our justice system was woven.

Nixon v. Singletary, 758 So.2d 618, 625-26 (Fla. 2000) (Harding, C.J., concurring).

PARIENTE and QUINCE, JJ., concur.

LEWIS, J., concurring in result only.

In concur in result only because I am compelled to do so solely and exclusively by the doctrine of law of the case. Although the decision and result here are, in my view, both legally and logically incorrect, the "roadmap to reversal" was previously drawn, and the misdirection of the correct applicable legal concepts written in Nixon v. Singletary, 758 So.2d 618 (Fla. 2000), which has become commonly referred to as Nixon II with which I dissented at the time. As unfortunate and convoluted at these legal and factual circumstances may be, I am bound by the prior decision of this Court and will honor its precedent.

In concurring in result only, I do not suggest that this Court has applied the appropriate standards or delivered the correct

principles of law in connection with cases involving defendants who have intentionally disrupted the legal process and legal proceedings for their own advantage as has occurred here. I believe the record clearly demonstrates that the defendant here intentionally disrupted his original trial proceedings, effectively blocked a proper and full truth-finding determination of the effective assistance of counsel issue when initially presented to this Court, and has now secured judicial benefits flowing from his disruptive tactics related to the legal proceedings conducted following the death of the victim in 1984. Almost twenty years after the event, this Court is rewarding an intentionally disruptive defendant and misdirecting a fair and just determination of the issues that should be properly before the court.

I suggest that this Court became misdirected when it held that the present case involved ineffective assistance of counsel per se under the decision of the United States Supreme Court in United States v. Cronic, 466 U.S. 648 (1984), when this Court considered the issue in Nixon II. In my view, this Court had previously considered and rejected such position ten years earlier in 1990 in Nixon v. State, 572 So.2d 1336 (Fla. 1990), when this Court unanimously affirmed Nixon's convictions and sentences. As I read the record in this Court, Nixon asserted on appeal to this Court prior to 1990 that per se ineffective assistance of counsel under Cronic had occurred during the trial proceedings. At that time, this Court remanded the case to the trial court simply for an evidentiary hearing to determine whether Nixon had been informed of the strategy to concede the factual predicate for the case and to center the case upon seeking leniency and preserving the life of the defendant. When the case was remanded at that time, the trial court found and determined:

> 1. Trial Defense Counsel Corin reviewed with capital Defendant/Appellant Nixon, the defense approach to the case in general terms including, but not limited to, the probability that he would concede the killing of the victim by Nixon.

2. Corin and Nixon had previous attorney-client relationships, both were veterans of the criminal justice system and although Nixon manifested no reaction, he understood what was to take place.

3. Nixon made no objection and did not protest the strategy and tactic employed at trial.

Based on the foregoing, this Court concludes that the Defendant/Appellant Nixon has not sustained his burden of proof by the applicable standard that he (a) was neither informed nor knew of the trial strategy and tactic employed by Defense Trial Counsel Corin nor (b) did not consent thereto or (c) acquiesce therein.

State v. Nixon, No. 84-2324-CF, order at 10 (Fla. 2d Cir. Ct. order filed Oct. 3, 1989).

The foregoing findings by the trial judge were entered as the case had been remanded to the trial court for specific findings on the issue. The trial court's order and findings were abundantly clear that Nixon never sustained his burden in connection with the claims of ineffective assistance of counsel based upon allegations that he was neither informed, nor knew of the trial strategy, nor did Nixon carry his burden to demonstrate that he had not consented to the trial strategy employed by this defense counsel. The findings entered before our 1990 opinion are important in consideration of the flow of the present case because in our earlier 1990 opinion, we specifically stated:

> However, the state's examination of Mr. Corin [defense counsel] was extremely limited due to this refusal to testify concerning matters not already addressed during his testimony for the defense absent Nixon's waiver of the attorney-client

> privilege. Nixon refused to waive the privilege and the State was unable to fully examine Mr. Corin.
>
> We recognize the confusion resulting from our remand for these atypical proceedings and decline to dispose of this claim on the present state of the record which we view as less than complete. Accordingly, we do so without prejudice to raise the issue in a later motion to vacate pursuant to Florida Rule of Criminal Procedure 3.850.

Nixon v. State, 572 So.2d at 1340 . It is clear that this Court was concerned at that time that it was not permitted to have access to the full information because Nixon had refused to waive the attorney-client privilege. The Court at that time noted that the record was incomplete due to Nixon's failure to waive the attorney-client privilege.

In my view, this Court in 1990 considered and rejected application of United States v. Cronic and rejected the view that under these circumstances per se ineffective assistance of counsel arose. If Cronic were applicable when presented to this Court in 1990, it would have been unnecessary to conduct further proceedings regarding the interaction between Nixon and his counsel. I suggest that the Court in 1990 understood the record before it and concluded that the record did not establish per se ineffective assistance of counsel as the applicable standard. There would have been no need for further activity had that been the conclusion of this Court at that time. In my view, this Court only permitted Nixon an opportunity to present the issue again in a collateral motion to afford an opportunity to Nixon to establish by additional evidence the elements required by Strickland. When the postconviction collateral motion was filed by Nixon and considered initially, Nixon chose not to present sufficient evidence to afford relief under Strickland, and, in fact, precluded full examination of the issue with regard to counsel's performance by refusing to permit his counsel to testify concerning their conversations. In

essence, in the collateral proceeding, this Court in Nixon v. Singletary, 758 So.2d 618 (Fla. 2000), permitted Nixon to assert the issue of ineffective assistance of counsel and then assert an attorney-client privilege by remanding for consideration of the issue under the standard established in Cronic rather than applying the requirements of Strickland.

My view of the record indicates that Nixon confessed to law enforcement and to members of his family with regard to the facts surrounding the murder of the victim in this case. The evidence indicated that Nixon was competent to participate in the trial proceeding, that he was malingering, and that he was attempting to disrupt the orderly process of the trial court proceedings. Under these circumstances, the majority of this Court in Nixon II, in my view, precluded trial counsel from attempting to save the life of a defendant through a trial strategy that would accept the existence of the overwhelming factual evidence and attempt to center upon preserving the life of the defendant. This Court announced the requirement in Nixon II that before this type of trial strategy or trial tactic may be utilized, the attorney must either first obtain express approval of the trial court after presenting all of the negative factual information to a trial judge who is the final adjudicator as to whether a death penalty will be imposed or obtain the express acceptance of a particular trial strategy by a disruptive defendant who has no intention of ever cooperating so that a trial proceeding could move forward. In m view, this Court reached an impractical result in Nixon II, and such result and the standards expressed therein rendered the proceedings which we now review as perfunctory steps in the process.

My review of this record demonstrates an especially aggravated circumstance where the victim had been kidnapped in her own motor vehicle from a local shopping mall, the victim had been tied between trees with motor vehicle jumper cables and the victim was actually burned alive. Here, Nixon confessed not only to law enforcement in substantial detail, but he also confessed to members of his immediate family who testified about those very

confessions during the trial. Three well-respected trial judges have now examined the issue of trial counsel's effectiveness and the trial strategy utilized, and have made it clear that this defense attorney was approaching this case in the only available and reasonable defense posture possible in attempting to save Mr. Nixon from the death penalty under the facts presented in this case.

In the initial postconviction collateral proceeding, the trial judge entered an exhaustive order detailing the conduct of this capable defense counsel and the very significant actions, including the introduction of some fifty exhibits in support of mitigation and the presentation of at least nine witnesses to provide mitigation evidence directed to the defendant's background, and mental and emotional problems. The trial judges have continuously emphasized the strategic theme and trial tactic that focused upon Nixon's mental and emotional problems and that defense counsel was simply presenting the very best argument and approach to secure a life sentence with the admitted aggravated factors that were presented before the jury.

When the case was before this Court in 2000, the trial judge during the initial postconviction proceeding had expressly addressed and rejected the argument that these circumstances must be controlled by United States v. Cronic, and the trial judge at that time expressly stated:

> (3) In the alternative, Defendant argues that counsel's concession of guilt without an express waiver by Defendant on the record constitutes ineffective assistance of counsel per se under United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Defendant claims that Cronic obviates the necessity of demonstrating prejudice, which is normally required for an ineffective assistance of counsel claim.

In Cronic, the United States Supreme Court held that when surrounding circumstances justify a presumption of ineffectiveness, a Sixth Amendment claim can be sufficient without inquiring into counsel's performance. Such circumstances arise when a Defendant is denied presence of counsel at a critical stage in the prosecution or when there is a breakdown in the adversarial process that would justify a presumption that a Defendant's conviction was reliable. Id. at 2046-2049. Cronic applies to a narrow spectrum of cases where counsel's ineffectiveness was so egregious that the Defendant was in effect denied any meaningful assistance at all. See also, Chadwick v. Green, 740 F.2d 897 (11th Cir. 1984). Apart from circumstances of that magnitude, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermine the reliability of the finding of guilt. Cronic, supra, at 2047 (citing Strickland v. Washington, 466 U.S. at 693-606, 104 S.Ct. At 2067-2069).

As evidenced by the court record cited in the above paragraphs, this case is not one in which the surrounding circumstances justify a presumption of ineffectiveness. There is no allegation that Defendant was denied assistance of counsel in his defense. Cronic, supra, at 2044. Neither the deficiency alleged, nor the record of the trial reveal a breakdown in the adversarial process that would justify a presumption that Defendant's conviction was not sufficiently reliable to satisfy the Constitution. Cronic, supra, at 2049. Because defense counsel's concession of guilt, to try to retain sympathy during the penalty phase, is an acceptable strategy, Defendant is required to show

> prejudice. This reasoning is consistent with other courts that have applied the Strickland standard for ineffective assistance of counsel claims, which requires prejudice to similar defense strategies. See Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987). Defense counsel's concession of guilt did not, and could not possibly have prejudiced Defendant in any way. The evidence of guilt was so overwhelming the jury would have found him guilty as charged even without concession. For the same reasons discussed under the Strickland claims, Defendant fails to show that but for counsel's errors the result of the proceeding would have been different.

When this Court in 2000 rejected this reasoning, it failed to accommodate the severe and aggravated factors with which the trial court was faced. The defendant here would not attend trial court proceedings, the defendant had removed his clothing in a holding cell, and the defendant had demanded that a different judge conduct the proceedings and that he be assigned different counsel. I suggest that the record in these proceedings prior to this Court's decision in 2000 reflects that Nixon had continually attempted to disrupt the proceedings in this case. When this Court rendered its decision in 2000 in Nixon II, it demonstrated that Nixon had succeeded in his attempt and that decision was predicated upon all facts which were available to be considered.

In my view, experienced defense counsel, who was doing the very best under the most difficult of circumstances, attempted to save the life of this defendant. The circumstances in this case involved very heinous and aggravated circumstances and the violent and aggravated circumstances were admitted by the defendant to not only law enforcement personnel but also to members of his family who all testified in detail concerning those confessions. Here, the circumstances, trial strategy, and trial tactics of experienced defense counsel have now been recognized by

multiple trial judges as the clearly appropriate and essentially the only defense strategy available under these aggravated facts. This record demonstrates that experienced defense counsel was conscientious and worked diligently in the best interests of his client as he attempted to preserve his life. In my opinion, it is clear that everyone, including Nixon, was aware of the trial strategy but the burden placed upon the proceedings by this Court in Nixon II rendered the present outcome the only possible outcome under the law and standards as stated.

I am extremely concerned that the history in this case may be improperly utilized by individuals in the future and that due to the nature of the restrictions this Court has now placed upon defense counsel, the defense of death penalty defendants will not be performed in the most effective manner possible. I suggest that cases such as this place trial lawyers in the most difficult of situations. When an individual confesses not only to law enforcement but also to members of his or her immediate family with regard to very aggravated and heinous crimes and this Court will not permit a trial attorney to even acknowledge that which has been confessed as true but forces the attorney to engage in full litigation as though the confessions never occurred, lawyers and the judicial system are placed in a precarious position and citizens are legitimately caused to question the veracity of lawyers and judicial proceedings. If I were writing on a clean slate, I would affirm the decision of the trial court here but, unfortunately, Nixon II directs a different result and I am therefore compelled to concur in the result based solely upon the law of the case.

WELLS, J., dissenting.

I dissent because I conclude that this Court's granting to defendant Nixon a new trial is legally wrong and not justified or demonstrated to be required by the majority opinion.

It has now been almost nineteen years since Ms. Bickner was abducted from the Governor's Square Mall in Tallahassee and murdered. This same issue upon which a new trial is now granted by the majority has been framed in this record since Judge Hall made his statement at the close of the trial proceedings in 1985. Clearly, this same issue was in the record when this Court affirmed Nixon's conviction and sentence of death in 1990.

Then, in 2000, if this Court was going to grant a new trial on this issue, the question was expressly before this Court. I wrote at that time:

> I also dissent because I believe the majority's opinion, after more than nine years, creates a new standard for this case. The majority opinion states at page 624 (slip opinion): "[W]e conclude that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough." Is this to be "established" by a preponderance of the evidence - clear and convincing evidence - or to the exclusion of every reasonable doubt? Is a nod of the head sufficient, or does the majority actually require a [Boykin v. Alabama, 395 U.S. 238 (1969)] on-the-record acceptance to have been made? It appears to me that the majority is here dictating a new trial, only leaving to the trial judge the actual ordering of it.

This appears to me to dictate a new trial because the record has been clear for the fifteen years since this trial that during the trial Nixon set about not to "explicitly accept" anything. This was part and parcel of his disruptive and noncooperative conduct. If "explicit acceptance" per Boykin is the requirement, this Court should have so stated in

> 1990. If that had been correctly the issue then, this Court's majority at that time would have reversed for a new trial based on the record, which does not have a Boykin on-the-record "explicit acceptance." However, the then unanimous majority did not do that. The present new majority confuses our procedure when it in actuality rehears and sets aside that decision. I conclude that it is harmful to the processing of capital cases generally when the majority of this Court erodes the distinction between direct appeal and postconviction relief for a particular case, as is being done here.

Nixon v. Singletary, 758 So.2d 618, 634 (Fla. 2000) (Wells, J., dissenting). But this Court did not order a new trial but remanded this case for an evidentiary hearing in the circuit court.

Upon that remand, Judge Janet Ferris held the hearing ordered by this Court's majority. Judge Ferris thereafter, in an exceptionally thorough and thoughtful order, came to the conclusion that the postconviction motion should be denied. In pertinent part, Judge Ferris' order states:

> Issues now before this court for resolution involve legal challenges initially raised in Defendant Joe Elton Nixon's direct appeal from his conviction and sentence of death for the murder of Jeanne Bickner. Ms. Bickner was murdered on August 12, 1984. Joe Elton Nixon's trial for that murder took place in July of 1985, and his conviction was appealed to the Florida Supreme Court. In the direct appeal, the Court was asked to address Mr. Nixon's claim that he was denied effective assistance of counsel at the guilt phase of his trial when his attorney, Assistant Public Defender Michael Corin, conceded guilt and sought leniency regarding Mr. Nixon's punishment. To fully

> explore that issue, the Florida Supreme Court temporarily relinquished jurisdiction to the trial court in October of 1987 to "determine whether Nixon was informed of the strategy to concede guilt and seek leniency." Nixon v. State, 572 So.2d 1336, 1339 (Fla. 1990).
>
> Due to some confusion about the procedure to be followed at the evidentiary hearing, a second order was issued by the Supreme Court on October 4, 1988, to outline which witnesses would be permitted to testify and limitations on their cross-examination. Continuing confusion about the scope of the hearing and the trial court's responsibilities at that hearing resulted in another clarifying order on February 1, 1989. At the August 30, 1989, hearing that finally attempted to resolve the ineffective assistance issue, Mr. Nixon declined to waive the attorney-client privilege, which effectively precluded Mr. Corin from discussing his communications with Mr. Nixon. The Supreme Court found the record of those proceedings "less than complete," and ultimately declined to dispose of the claim, inviting the defendant to revisit the matter in a post-conviction motion brought pursuant to Florida Rule of Criminal Procedure 3.850. Nixon, at 1339-1340.
>
> Mr. Nixon filed his 3.850 motion on October 7, 1993. In 1997, the trial court denied the motion without an evidentiary hearing. Included in that order was the summary denial of several claims asserting that Mr. Nixon's trial counsel was ineffective, including the specific claim that Mr. Corin's concession of guilt without an express waiver by Defendant on the record constituted per se ineffective assistance of counsel under United

States v. Cronic, 466 U.S. 648 (1984). The trial court disposed of Mr. Nixon's Cronic claim by finding that ". . . his case is not one in which the surrounding circumstances justify a presumption of ineffectiveness. . . . Neither the deficiency alleged, nor the record of the trial reveal a breakdown in the adversarial process that would justify a presumption that Defendant's conviction was not sufficiently reliable to satisfy the Constitution (citation omitted)." That order was appealed to the Florida Supreme Court, resulting in Nixon v. Singletary, 758 So.2d 618 (Fla. 2000), the decision which has again remanded Mr. Nixon's case to the trial court for a limited evidentiary hearing.

In Nixon v. Singletary, the Supreme Court considered both the trial court's summary denial of Mr. Nixon's 3.850 post-conviction motion and his petition for writ of habeas corpus. In deciding to remand the case to the circuit court for an evidentiary hearing, the Court concluded that the ". . . resolution of one issue . . . [is] dispositive in this case: whether Nixon's trial counsel was ineffective during the guilt phase of the trial." Nixon v. Singletary at 620. Although numerous ineffectiveness claims were raised in Mr. Nixon's 3.850 motion, the Court's decision focused on Nixon's charge that his attorney's concession of guilt in opening statement was ". . . the equivalent of a guilty plea by his attorney." Nixon v. Singletary at 620. Mr. Nixon's further claim that he did not give his attorney consent to enter a guilty plea and did not consent to a trial strategy in which guilt would be admitted was a compelling issue for the Court. In a lengthy opinion, the Court concluded that Mr. Corin's statements to the jury

were the "functional equivalent of a guilty plea." Nixon v. Singletary at 624.

Reasoning further that due process requires ". . . a court accepting a guilty plea to carefully inquire into a defendant's understanding of the plea so that the record contains an affirmative showing that the plea was intelligent and voluntary . . . ," the Court indicated that Mr. Nixon's "consent to this trial counsel to concede guilt" would apparently substitute for the lack of an inquiry and finding by the trial court that the "plea" was intelligent and voluntary. As further direction to this court regarding the evidentiary hearing, the Supreme Court observed that ". . . Nixon's claim must prevail at the evidentiary hearing below if the testimony established that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough." Nixon v. Singletary at 624. The Supreme Court found that the need for affirmative, explicit acceptance of this trial strategy emanates from the principle that ". . . the defendant, not the attorney, is the captain of the ship. . . . Although the attorney can make some tactical decisions, the ultimate choice as to which direction to sail is left up to the defendant. The question is not whether the route taken was correct; rather the question is whether Nixon approved of the course." Nixon v. Singletary at 625.

The Supreme Court's remand appears limited to one issue: did Joe Elton Nixon give his attorney, Mike Corin, consent to concede guilt at trial, and was that consent supported or evidenced by an "affirmative, explicit acceptance by Nixon" of this specific aspect of the trial strategy? One might

suspect that such a question could be answered quickly and easily following a brief hearing. Unfortunately, that is not the case. Not only has there been disagreement about the status of Mr. Nixon's other post-conviction claims, but there is continuing dispute about the appropriate legal standard to be employed in resolving claims such as this. The State has forcefully argued that the Florida Supreme Court's understanding of United States v. Cronic, supra, is flawed, and that recent federal court decisions interpreting Cronic have explicitly rejected the Supreme Court's analysis of the issue. The State argues here, as it has recently in the United States Supreme Court, that the Florida Supreme Court's interpretation of Cronic is "overly expansive" and is contrary to the holding of the seminal post-conviction case of Strickland v. Washington, supra. Although compelling arguments, this court cannot agree that it is a liberty to revisit the legal basis for the remand in Nixon v. Singletary, supra. Other opportunities exist for the State to present its argument for resolution by the Florida Supreme Court and the United States Supreme Court.

It is obvious, however, that the Florida Supreme Court's opinion presents this court with a dilemma. Ordinarily, those matters deemed inappropriate for summary resolution of 3.850 post-conviction claims are returned to the trial court intact for an evidentiary hearing, and the resolution of the motion is based on application of the law to the facts determined at the hearing. In Nixon v. Singletary, the Supreme Court not only resolved the legal issues, but also circumscribed the type of evidence and the manner in which it could be considered by the trial court in addressing Mr.

Nixon's claim. The most obvious concern faced by this court is how to balance the Supreme Court's direction to not only determine whether Mr. Nixon gave his consent to Mr. Corin's strategy of concession of guilt, but to do so only in the context of an "affirmative, explicit acceptance by Nixon" of that strategy. Ordinarily, the trial court may consider many factors in resolving issues of knowing and voluntary waivers of rights, and this case should be no exception. The court must also note that the burden of advancing his claim rests with Mr. Nixon, not the State, but the language of Nixon v. Singletary, suggests a shifting of that burden. The court can only conclude that such a shift was not intended, and that the burden of proof still rests with Mr. Nixon to show that he did not consent to the strategy affirmatively and explicitly.

At the evidentiary hearing held on May 11, 2001, Mr. Nixon did not testify, although he was present in the courtroom. Instead, counsel for Mr. Nixon called Mr. Corin to the witness stand, presumably to show that Mr. Nixon did not consent. Mr. Corin was candid and forthright in his testimony, and struggled to recall the details of an attorney-client relationship that was forged seventeen years ago. The details of that relationship are complicated by Mr. Nixon himself, a rather intractable client charged with an especially horrible and notorious crime. The record of the guilt and penalty phases of his trial demonstrate that Mr. Nixon had mental health problems dating back to a very young age. Mental health professionals who examined Mr. Nixon prior to trial specifically noted that although Mr. Nixon was competent to stand trial and "technically" capable of cooperating with his attorney, ". . . his lifelong history of lying and

creating fantasy situations and blaming others for his troubles . . . [will make it] extremely difficult to get his full cooperation. . ."

That difficulty was evident a trial when Mr. Nixon removed his clothing in the holding cell during jury selection in an express demonstration of his refusal to attend the trial; he had previously refused to attend pretrial motions on July 8 and 9, 1985, forcing Mr. Corin to waive his presence at those hearings. Nixon v. State, at 1341. Without much elaboration, he insisted on being returned to the jail, wanted a new attorney, demanded a black judge, and threatened to disrupt the rial if he was forced into the courtroom. Nixon v. State, at 1341. During his conversation with Judge Hall in the holding cell, Mr. Nixon rarely answered the question posed to him, and at one point flatly refused to answer any more questions. The colloquy between Mr. Nixon and Judge Hall shows that Mr. Nixon was generally unresponsive to Judge Hall's patient inquiries, and consciously evaded answering the judge's questions regarding his refusal to enter the courtroom. The Supreme Court accepted Judge Hall's finding that Mr. Nixon's extraordinary behavior constituted a knowing, intelligent, and voluntary waiver of his attendance at the trial. That waiver, however, was based on the judge's finding that if Mr. Nixon failed to return to the courtroom after the recess, he would be consenting to proceeding without him. Id.

This court concurs in Judge Hall's conclusion that Mr. Nixon knowingly, intelligently, and voluntarily waived his attendance at the trial. However, it must be noted that the record does not reflect what

would ordinarily be considered an affirmative, explicit waiver by Mr. Nixon of his right to be present at trial; instead, Judge Hall made his decision based on the circumstances as they existed at the time, Mr. Nixon's unusual behavior, and his exasperating conversation with Mr. Nixon. It is therefore obvious that the decision regarding whether Mr. Nixon consented to Mr. Corin's trial strategy can be made only after careful consideration of similar factors.

One of those factors must be the general patterns of Mr. Corin's interactions and communications with Mr. Nixon. By 1984, when he undertook representation of Mr. Nixon in this case, Mr. Corin was an experienced trial attorney, and had also handled capital criminal appeals as an Assistant Attorney General and an Assistant Public Defender. Mr. Corin's experienced with capital cases included attending and lecturing at a course designed exclusively for attorneys involved in capital cases. It is also of some note that Mr. Corin had represented Mr. Nixon in at least one other felony case prior to him being charged with first degree murder. The record clearly reflects that Mr. Corin conscientiously prepared the case for trial, and met numerous times with Mr. Nixon to discuss various trial strategies, the defenses that might apply in the case, and witnesses.

Mr. Corin indicated that his relationship with Mr. Nixon was generally positive, and that they got along "fine." Despite an apparent lack of rancor or hostility in their attorney-client relationship, Mr. Corin noted that Mr. Nixon was not especially communicative, and often did not respond at all in discussions about the case. Testimony from Mr.

Corin about Mr. Nixon's reaction to discussions about trial strategy, and in particular about conceding guilt, was especially compelling; Mr. Corin observed that although he discussed these matters with Mr. Nixon on several occasions, Mr. Nixon "did nothing." More importantly, Mr. Corin stated unequivocally that he would not have pursued the strategy of conceding guilt if Mr. Nixon had objected. The only conclusion that can be reached from this uncontroverted testimony is that the pattern of interactions in the attorney-client relationship between Mr. Corin and Mr. Nixon often involved information being provided by Mr. Corin, followed by silence from Mr. Nixon. Whether that pattern of interaction was constructive or helpful is not the issue; rather, Mr. Corin appears to have done all he could to carefully prepare the case for trial, consider the viability of various defenses, inform Mr. Nixon of what was happening with his case, and finally, tell his client what strategies he intended to pursue. It makes little sense to assume that a lawyer would encourage of prefer such stony silence from his or her client; there can be no doubt that active participation by the client in their defense is far more productive. It is also clear that when a client is a highly educated, intelligent, and articulate individual with no mental health problems, the patterns of communication between lawyer and client will be quite different from what usually transpired between Mr. Corin and Mr. Nixon. Mr. Corin did the best he could with a difficult case and a difficult client.

In resolving post-conviction claims, defendants urge trial courts to revisit each and every decision made by an attorney before, during and after a trial.

Increasing numbers of motions to withdraw pleas are filed, and post-conviction motions asserting misadvice of counsel leading up to entry of a plea have flooded the trial courts. At their core are various assumptions about a criminal defendant's "right" to perfection in his or her representation. As the State noted in its Memorandum, everyone involved in the court process must possess a ". . . true understanding of the realities of representing criminal defendants." Mr. Corin perhaps stated the obvious when he testified that representing criminal defendants is a "pretty tough job" because some clients are helpful and others are not. He patiently pointed out that as a defense attorney ". . . you hope that you have clients that are cooperative"; when clients are not, "you do the best you can . . . [and] represent them to the best of your ability." In response to a question from Assistant State Attorney Eddie Evans, Mr. Corin responded as follows: "But you've never been a criminal defense lawyer. So you don't really understand exactly how it is when you represent human beings in cases. And it is just not black and white, but and dry. There are many times lawyers make decisions because they have to make them because the client does nothing." Mr. Corin's response was: "Yes, sir."

Mr. Corin's statements are compelling. The record of Mr. Nixon's trial provides ample evidence of what Mr. Corin faced in his interactions and communications with Mr. Nixon. It is hard to imagine a more onerous situation than a client charged with first degree murder absenting himself from the trial; here, in addition to a confession and overwhelming evidence, Mr. Corin had to contend with the prejudice Mr. Nixon would

surely create by not being present in the courtroom during the trial. Did Mr. Nixon discuss with Mr. Corin his decision to take off his clothing and refuse to enter the courtroom? Should there have been an inquiry about whether this was Mr. Nixon's execution of an agreed-upon trial strategy, and whether he consulted with his attorney about it? It is evident Mr. Nixon made his position known through bizarre behavior and angry statements, and not by an affirmative or explicit discussion of his decision with trial counsel or the court. It is likewise impossible to resolve the Supreme Court's question by reliance on an unrealistic construct. Mr. Corin's conduct as an attorney in this case must be evaluated by the objective standards described in the case law articulated by the United States Supreme Court, the Florida Supreme Court, and our District Courts of Appeal. That objective standard also must be applied to the facts and circumstances of this case, without resort to unfair presumptions about what should have occurred.

Relying on the trial court, the two reported decisions of the Florida Supreme Court addressing Mr. Nixon's case, and the evidentiary hearings conducted on December 19, 1988 and May 11, 2001, this court finds that Mr. Nixon did consent to the trial strategy of conceding guilt. His consent occurred as a part of his natural pattern of communication with Mr. Corin, wherein Mr. Corin would discuss these matters with Mr. Nixon, and Mr. Nixon would refuse to respond. The court further finds that the fact that Mr. Nixon did not provide counsel with an affirmative, explicit consent in words, and in the manner that we ordinarily expect and presume is acceptable, does

not mean that it was not given. Looking to Mr. Nixon's manner of communicating with counsel and with the court during his jury trial alone, it is obvious that Mr. Nixon is often more comfortable communicating through his behavior, rather than the spoken word. The lack of words cannot, and did not, render his communication any less clear or explicit. Were we now to craft a legal standard requiring articulation for every knowing and voluntary waiver of rights, where other evidence exists to support the conclusion that a knowing and voluntary waiver occurred, we will create a standard that is impossible to meet. We may also encourage the creation of situations that will be impossible to resolve: if after jeopardy attaches in a jury trial, the defendant merely refuses to answer a judge's questions about his or her presence at the trial, agreement with trial strategies such as conceding guilt on some charges but not others, or testifying at trial, what is the appropriate resolution of such an obvious stalemate? Trial courts must be given the opportunity to resolve such matters based upon the facts, rather than the existence or non-existence of certain words. In the case at bar, Mr. Nixon's actions speak clearly. We cannot now search for words that he was clearly disinclined to provide.

State v. Nixon, No. R84-2324AF, order at 1-14 (Fla. 2d Cir. Ct. order filed Sept. 20, 2001) (record references omitted). Judge Ferris did what this Court's majority ordered. She held an evidentiary hearing and reached a factual conclusion. Now this court rejects Judge Ferris's conclusion and grants a new trial. I agree with Judge Ferris.

SHAW, Senior Justice, concurs.

Three Cases Consolidated:

Two Appeals from the Circuit Court in and for Leon County,

L. Ralph Smith, Jr., Judge - Case No. 84-2324

and An Original Proceeding - Habeas Corpus

Jonathan Lang, New York, New York, Eric M. Freedman, New York, New York, and John J. Lavia, III of Landers & Parsons, Tallahassee, Florida,

for Appellant/Petitioner

Charles J. Crist, Jr., Attorney General, and Curtis M. French, Senior Assistant Attorney General, Tallahassee, Florida,

for Appellee/Respondent.

Joe Elton NIXON, Petitioner,

v.

Harry K. SINGLETARY, Respondent,

Joe Elton NIXON, Appellant,

v.

State of Florida, Appellee,

Nos. SC93192, SC92006

Supreme Court of Florida.

Jan. 27, 2000

Rehearing Denied June 9, 2000

After his first-degree murder, kidnapping, robbery, and arson convictions and death sentence were affirmed on direct appeal, 572 So.2d 1336, defendant sought postconviction relief. The Circuit Court, Leon County, L. Ralph Smith, Jr., J., denied motion. Defendant appealed and petitioned for writ of habeas corpus. The Supreme Court held that: (1) remand was required to permit trial court to determine whether defendant consented to trial strategy in which counsel conceded guilt, and (2) presumption of ineffective assistance arising from concession of guilt could only be overcome by showing of defendant's affirmative, explicit acceptance of that strategy.

Remanded.

Harding, C.J., concurred and filed a separate opinion in which Anstead and Pariente, JJ., concurred.

Anstead, J., concurred specially and filed a separate opinion.

Wells, J., dissented and filed a separate opinion.

Lewis, J., dissented.

Jonathan Lang, New York, New York, for Petitioner/Appellant.

Robert A. Butterworth, Attorney General, and Richard B. Martell, Chief, Capital Appeals, Tallahassee, Florida, for Respondent/Appellee.

PER CURIAM.

Joe Elton Nixon, a prisoner under sentence of death, appeals the trial court's order denying his Florida Rule of Criminal Procedure 3.850 motion for postconviction relief. Nixon also petitions this Court for a writ of habeas corpus. We have jurisdiction pursuant to article V, section 3(b)(1) and (9) of the Florida Constitution. For the reasons explained below, we remand this case to the circuit court to hold an evidentiary hearing on Nixon's ineffective assistance of counsel claim.

Nixon was convicted of first-degree murder, kidnapping, robbery, and arson. He was sentenced to death for the first-degree murder conviction. On appeal, this Court affirmed the conviction and sentences, including the death sentence. See Nixon v. State, 572 So.2d 1336 (Fla. 1990).

Nixon filed a rule 3.850 motion, which the trial court denied without an evidentiary hearing. Nixon appeals the trial court's denial of his motion for postconviction relief. He also petitions this Court for a writ of habeas corpus. Nixon raises seven issues relating to the trial court's denial of his rule 3.850 motion.[1] He raises three issues in his petition for writ of habeas corpus.[2] We find the resolution of one issue to be dispositive in this case: whether Nixon's trial counsel was ineffective during the guilt phase of the trial.

Nixon's trial counsel made the following remarks during his opening statement in the guilt phase:

> In this case, there was be no question that Jeannie [sic] Bickner died a horrible, horrible death. Surely she did and that will be shown to you. In fact, that horrible tragedy will be proved to your satisfaction beyond any reasonable doubt.

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[1] Nixon argues the following claims relating to the trial court's denial of his 3.850 motion: (1) the circuit court denied him a full and fair hearing on his ineffective assistance of counsel claim; (2) he was denied his rights not to be tried while mentally incompetent; (3) his death sentence must be set aside because his counsel failed to make an effective argument for sparing his life and presented evidence that was harmful to his case during the sentencing phase of the trial; (4) he was denied a competent mental health evaluation in violation of Ake v. Oklahoma, 470 U.S. 68 (1985); (5) he is entitled to prove his claims under Johnson v. Mississippi, 486 U.S. 578 (1988), that the two prior convictions used as aggravating circumstances lacked validity; (6) he should have the opportunity to prove that race discrimination tainted his conviction and death sentence; and (7) the jury weighed invalid and unconstitutionally vague aggravating circumstances in violation of James v. State, 615 So.2d 668 (Fla. 1993), and Jackson v. State, 648 So.2d 85 (Fla. 1994).

[2] Nixon presents the following claims in his habeas petition: (1) appellate counsel failed to raise on direct appeal any issue regarding Nixon's competence to stand trial; (2) appellate counsel failed to properly preserve Nixon's claims under Ake v. Oklahoma; and (3) appellate counsel failed to properly preserve Nixon's claims under James v. State, and Jackson v. State.

> In this case, there won't be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie [sic] Bickner's death. Likewise, that fact will be proved to your satisfaction beyond any reasonable doubt. This case is about the death of Joe Elton Nixon and whether it should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement.

Nixon, 572 So.2d at 1339. During his closing argument, Nixon's counsel said:

> Ladies and gentlemen of the jury, I wish I could stand before you and argue that what happened wasn't caused by Mr. Nixon, but we all know better. For several very obvious and apparent reasons, you have been and will continue to be involved in a very uniquely tragic case. In just a little while Judge Hall will give you some verdict forms that have been prepared. He'll give you some instructions on how to deliberate this case. After you've gotten those forms and you've elected your foreperson and you've done what you must do, you will sign those forms. I know you are not going to take this duty lightly, and I know what you will decide will be unanimous. I think that what you will decide is that the State of Florida, Mr. Harkinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson.

Id. Nixon argues that these comments were the equivalent of a guilty plea by his attorney. He claims that he did not give his

attorney consent to enter a guilty plea or agree to allow his attorney to undertake a trial strategy in which guilt would be admitted.[3] Nixon claims that as a result of these comments, he was denied effective representation.

On direct appeal, this Court addressed this issue and remanded the case to the trial court for an evidentiary hearing to determine whether counsel had received Nixon's consent to use this trial strategy:

> Over Nixon's objection, this Court remanded to the trial court for an evidentiary hearing to determine whether Nixon was informed of the strategy to concede guilt and seek leniency. Order of October 4, 1988, clarifying the procedure to be followed in connection with the evidentiary hearing, the defendant was allowed to present witnesses but the state was not. The state's cross-examination of Mr. Corin, Nixon's trial counsel, was limited to the scope of direct examination by the defense. Because the trial court did not interpret the order of October 4, 1988, as requiring him to make findings or conclusions, none were made. On further remand by order of February 1, 1989, the state was allowed to present witnesses. However, the state's examination of Mr. Corin was extremely limited due to his refusal to testify concerning matters not already addressed during his testimony for the defense absent Nixon's waiver of the attorney-client privilege. Nixon refused to waive the privilege and the state was unable to fully examine Mr. Corin.

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[3] Nixon voluntarily absented himself from the courtroom during his trial. Hence, he was not present when his attorney made the statements in question.

Id. at 1339-40. This Court eventually declined to rule on the matter:

> We recognize the confusion resulting from our remand for these atypical proceedings and decline to dispose of this claim on the present state of the record which we view as less than complete. Accordingly, we do so without prejudice to raise the issue in a later motion to vacate pursuant to Florida Rule of Criminal Procedure 3.850.

Id. at 1340 (footnote omitted).

We begin our analysis by reiterating that the Sixth Amendment of the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. Amend VI.[4] The United States Supreme Court has stated that "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for its affects his ability to assert any other rights he may have." United States v. Cronic, 466 U.S. 648, 654 (1984) (quoting Walter V. Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956)).

In addition to the right to effective assistance of counsel, "the Due Process Clause [of the Fourteenth Amendment] protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). The State bears the burden of making this demonstration. See Speiser v. Randall, 357 U.S. 513, 526 (1958).

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[4] "In Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), the Court held that the Sixth Amendment right to counsel was incorporated into the due process clause [of the Fourteenth Amendment] and would apply to the states in all felony prosecutions." Vagner v. Wainwright, 398 So.2d 448, 450 (Fla. 1981).

The parties are in disagreement regarding the appropriate standard of review in this case. The State urges this Court to apply Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, in order to establish an ineffective assistance of counsel claim, a defendant must demonstrate (1) deficient performance by counsel and (2) prejudice to the defense. Nixon, on the other hand, argues that counsel's conduct in this case amounted to per se ineffective assistance of counsel, and that United States v. Cronic is the proper test. In Cronic, decided the same day as Strickland, "the Supreme Court created an exception to the Strickland standard for ineffective assistance of counsel and acknowledged that certain circumstances are so egregiously prejudicial that ineffective assistance of counsel will be presumed." Stano v. Dugger, 921 F.2d 1125, 1152 (11th Cir. 1991) (en banc). The Supreme Court stated:

> Moreover, because we presume that the lawyer is competent to provide the guiding hand that the defendant needs, see Michel v. Louisiana, 350 U.S. 91, 100-101 1955), the burden rests on the accused to demonstrate a constitutional violation. There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.
>
> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in Davis v. Alaska, 415 U.S. 308 (1974), because the petitioner has been "denied the right to effective cross-examination" which "would be constitutional

> error of the first magnitude and no amount of showing of want of prejudice would cure it.'" Id., at 318 (citing Smith v. Illinois, 390 U.S. 129, 131 (1968), and Brookhart v. Janis, 384 U.S. 1, 3 (1966).

Cronic, 466 U.S. at 658-59 (emphasis added).

We emphasize that the Strickland standard normally applies to ineffective assistance of counsel claims. Cronic only applies to the narrow spectrum of cases where the defendant was completely denied effective assistance of counsel. See Chadwick v. Green, 740 F.2d 897, 900 (11th Cir. 1984).

To determine which test applies, we must first decide whether Nixon's trial counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." Cronic, 466 U.S. at 659. Trial counsel's statements during opening and closing arguments raise a question as to whether Nixon's trial counsel did, in fact, fail to subject the State's case to meaningful adversarial testing. See United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991) ("Mr. Ochoa's statements lessened the Government's burden of persuading the jury that Swanson was the perpetrator of the bank robbery[,] . . . tainted the integrity of the trial[,] . . . [and] was an abandonment of the defense of his client at a critical stage of the criminal proceedings.");[5] Osborn v. Shillinger, 861 F.2d 612,

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[5] The Swanson court also stated:

> The circumstances presented in this matter demonstrates the constructive absence of an attorney dedicated to the protection of his client's rights under our adversarial system of justice. Once Swanson's court appointed attorney told the jury that there was no reasonable doubt regarding his client's identity as the perpetrator of the crime charged against him, he ceased to function as defense counsel. "An effective attorney 'must play the role of an active advocate, rather than a mere friend of the court.'" Osborn, 861 F.2d at 624 (quoting Evitts v. Lucey, 469 U.S. 387, 394, 105 S.Ct. 830, 835, 83 L.Ed.2d 821 (1985)). Instead of serving as his client's advocate during closing argument, Mr. Ochoa abandoned his client at a critical stage of the

625 (10th Cir. 1988) ("[A]n attorney who adopts and acts upon a belief that his client should be convicted 'fail[s] to function in any meaningful sense as the Government's adversary.'"). Therefore, if Nixon can establish that he did not consent to counsel's strategy,

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> proceedings and affirmatively aided the prosecutor in her efforts to persuade the jury that there was no reasonable doubt that Swanson was the person who intimidated the victims and robbed the bank.
>
> Mr. Ochoa's abandonment of his duty of loyalty to his client by assisting the prosecutor also created a conflict of interest. In Osborn, the Tenth Circuit commented as follows:
>
> > A defense attorney who abandons his duty of loyalty to his client and effectively joins the state in an effort to attain a conviction or death sentence suffers from an obvious conflict of interest. Such an attorney, like unwanted counsel, "'represents' the defendant only through a tenuous and unacceptable legal fiction." Faretta v. California, 422 U.S. 806, 821, 95 S.Ct. 2525, 2534, 45 L.Ed.2d 562 (1975). In fact, an attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition.
>
> 861 F.2d at 629.
>
> The Government has failed to identify any strategy that can justify Mr. Ochoa's betrayal of his client. "[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt." Cronic, 466 U.S. at 656-57 n. 19, 104 S.Ct. at 2045-46 n. 19. By arguing that no reasonable doubt existed regarding the only factual issues in dispute, Mr. Ochoa shouldered part of the Government's burden of persuasion.
>
> We cannot envision a situation more damaging to an accused than to have his own attorney tell the jury that there is no reasonable doubt that his client was the person who committed the conduct that constituted the crime charged in the indictment.
>
> 943 F.2d at 1075 (emphasis added).

then we would find counsel to be ineffective per se and Cronic would control. We agree with the reasoning of Wiley v. Sowders, 647 F.2d 642, 650 (6th Cir. 1981), where the Sixth Circuit Court of Appeals stated:

> Although statements made by attorneys in closing arguments are not evidence, nevertheless, for all practical purposes, counsel's admission of guilt on behalf of his client denied to petitioner his constitutional right to have his guilt or innocence decided by the jury. Petitioner, in pleading not guilty, was entitled to have the issue of his guilt or innocence presented to the jury as an adversarial issue. Counsel's complete concession of petitioner's guilt nullified the adversarial quality of this fundamental issue.

Under Cronic, a defendant need not show prejudice; prejudice is presumed. See 446 U.S. at 658-60. See also State v. Harbison, 337 S.E.2d 504, 507 ("[W]hen counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed."). On the other hand, if Nixon did consent to trial counsel's strategy, then it could not be said that trial counsel was ineffective, and Nixon would not be entitled to relief on this claim.

We recognize that in certain unique situations, counsel for the defense may make a tactical decision to admit guilt during the guilt phase in an effort to persuade the jury to spare the defendant's life during the penalty phase. Of course, in such cases, the dividing line between a sound defense strategy and ineffective assistance of counsel is whether or not the client has given his or her consent to such a strategy. See Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983); Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981); Jones v. State, 877 P.2d 1052 (Nev. 1994); State v. Anaya, 592 A.2d 1142 (N.H. 1991); State v. Harbison, 337 S.E.2d 504 (N.C. 1995).

Although an attorney has the right to make tactical decisions regarding trial strategy, see Faretta v. California, 422 U.S. 806, 820 (1975), the determination to plead guilty or not guilty is a matter left completely to the defendant. See Jones v. Barnes, 463 U.S. 745, 751 (1983) ("It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal . . . ."); Brookhart v. Janis, 384 U.S. 1 (1966) (stating that although an attorney can make tactical decisions as to how to run a trial, the Due Process Clause does not permit an attorney to admit facts that amount to a guilty plea without the client's consent). At his arraignment, Nixon entered a "not guilty" plea. By pleading "not guilty," Nixon exercised his right to make a statement in open court that he intended to hold the State to strict proof beyond a reasonable doubt as to the offenses charged. See Byrd v. United States, 342 F.2d 939, 941 (D.C. Cir. 1965); Licata v. State, 81 Fla. 649, 88 So. 621, 622 (1921). "Unquestionably, the constitutional right of a criminal defendant to plead 'not guilty,' or perhaps more accurately not to plead guilty, entails the obligation of his attorney to structure the trial of the case around his client's plea." Wiley, 647 F.2d at 650.

Thus, the dispositive issue in this case is whether Nixon gave his consent to his trial counsel to concede guilt during the guilt phase of the trial. Because Nixon previously invoked the attorney-client privilege, the 1990 Court was unable to get the answer to this question. Essentially, the 1990 Court issued an invitation to Nixon to raise this issue again in his 3.850 motion. Implicit within that invitation was that the postconviction circuit court conduct another evidentiary hearing, without the risk of the attorney-client privilege, to determine whether Nixon consented to the strategy. Despite this, the circuit court in the present postconviction motion refused to grant an evidentiary hearing, and this Court still does not have the answer that it has been seeking for the last eleven years. Therefore, we remand this case for an evidentiary hearing on this issue. Due process demands this result.

In Boykin v. Alabama, 395 U.S. 238 (1969), the Supreme Court held that a defendant may not enter a guilty plea unless that plea is intelligent and voluntary:

> A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment. See Kercheval v. United States, 274 U.S. 220, 223. Admissibility of a confession must voluntariness issue which satisfies the constitutional rights of the defendant." Jackson v. Denno, 378 U.S. 368, 387. The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation. In Carnley v. Cochran, 369 U.S. 506, 516, we dealt with a problem of waiver of the right to counsel, a Sixth Amendment right. We held: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, than an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."
>
> We think that the same standard must be applied to determining whether a guilty plea is voluntarily made. For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality. The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards. Douglas v. Alabama, 380 U.S. 415, 422.

Id. at 242-43 (footnote omitted). Consequently, this Court has stated that "[d]ue process requires a court accepting a guilty plea to carefully inquire into the defendant's understanding of the plea, so that the record contains an affirmative showing that the plea was intelligent and voluntary." Koenig v. State, 597 So.2d 256, 258 (Fla. 1992). See also Fla. R. Crim. P. 3.172.

Because counsel's comments were the functional equivalent of a guilty plea, we conclude that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough. We also make clear that pursuant to Nixon's ineffective assistance of counsel claim, Nixon has waived the attorney-client privilege. See Reed v. State, 640 So.2d 1094, 1097 (Fla. 1994) ("Thus, it is clear that conversations between the defendant and his or her trial lawyer relevant to ineffective assistance of counsel are not protected by the attorney-client privilege."); Sec. 90.502(4)(c), Fla. Stat. (1999).

We recognize that Nixon was very disruptive and uncooperative at trial. In light of this, as well as the overwhelming evidence in this case, it has been suggested that the strategy employed by Nixon's trial counsel represented Nixon's best chance of receiving a life sentence, and, therefore, counsel should not be faulted or deemed ineffective. Indeed, counsel's strategy may have been in Nixon's best interest. Nevertheless, the Supreme Court has made it clear that the defendant, not the attorney, is the captain of the ship. See Jones; Brookhart. Although the attorney can make some tactical decisions, the ultimate choice as to which direction to sail is left up to the defendant. The question is not whether the route taken was correct; rather, the question is whether Nixon approved of the course.

It has also been suggested that absent this strategy, Nixon's counsel had no other options. We disagree. In every criminal case, a defense attorney can, at the very least, hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the

State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt. Without Nixon's consent to do otherwise, this should have been the strategy utilized by defense counsel. If this strategy worked to Nixon's detriment, Nixon himself must bear the responsibility for that decision. Cf.. Faretta, 422 U.S. at 834 ("The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. . . . And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'") (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring).

Finally, in order to avoid similar problems in the future, we hold that if a trial judge ever suspects that a similar strategy is being attempted by counsel for the defense, the judge should stop the proceedings and question the defendant on the record as to whether or not he or she consents to counsel's strategy. See Wiley, 647 F.2d at 650 ("In those areas where counsel advises his client that the latter's guilt should be admitted, the client's knowing consent to such trial strategy must appear outside the presence of the jury on the trial record in the manner consistent with Boykin."); State v. House, 456 S.E.2d 292, 297 (N.C. 1995) ("Further, we take this opportunity to urge both the bar and the trial bench to be diligent in making a full record of a defendant's consent when a Harbison issue arises at trial."). This will ensure that the defendant has in fact intelligently and voluntarily consented to counsel's strategy of conceding guilt.

Accordingly, for the reasons stated in this opinion, we remand this case to the circuit court to hold an evidentiary hearing on the issue of whether Nixon consented to defense counsel's strategy to concede guilt. In light of our disposition of Nixon's 3.850 appeal, we do not address his habeas claims at this time.

It is so ordered.

HARDING, C.J., and SHAW, ANSTEAD and PARIENTE, JJ., concur.

HARDING, C.J., concurs with an opinion, in which ANSTEAD and PARIENTE, JJ., concur

ANSTEAD, J., specially concurs with an opinion.

WELLS, J., dissents with an opinion.

LEWIS, J., dissents.

HARDING, C.J., concurring.

"We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." U.S. Const. preamble (emphasis added). As exemplified by the Preamble to this nation's Constitution, justice is the very foundation upon which our system of government was built. Inherent within the concept of justice is the fair processing of cases. Black's Law Dictionary provides the following definition of justice:

> Proper administration of laws. In jurisprudence, the constant and perpetual disposition of legal matters or disputes to render [all persons their] due.

Black's Law Dictionary 864 (6th ed. 1990) (emphasis added). Consequently, the term "due process of law" has developed to mean:

> A course of legal proceedings according to those rules and principles which have been established in

> our systems of jurisprudence for the enforcement and protection of private rights.

Id. at 500.

Prior to this nation's birth, the colonists were subjected to a system of government that denied individual rights and liberties and failed to provide due process. Based on their experience with the English monarchy and its courts, the founders of this country were determined to ensure that a number of individual rights and liberties were specifically provided for within the body of the Constitution. Today these rights include the right to have effective assistance of counsel in criminal matters, the right against self-incrimination, the right to an impartial jury, the right to a fair trial, the right to confront one's accusers, the right to be presumed innocent until proven guilty, and the right that the government prove a criminal matter beyond a reasonable doubt. These rights are available to all citizens, regardless of race, creed, or social status. History has shown that it is only when due process is strictly adhered to that judicial outcomes are credible. It has been said a number of times that it is more important that no innocent man be convicted than a guilty man go free. See In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free."); Furman v. Georgia, 408 U.S. 238, 367 n.158 (1972) (Marshall, J., concurring) ("[I]t is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned.") (quoting William O. Douglas, Foreword to Jerome Frank & Barbara Frank, Not Guilty 11-12 (1957)).

I share and understand the frustration of my colleagues in dissent. This is a difficult case for several reasons, not the least of which is the substantial evidence of the defendant's guilt. I do not question the competence or experience of trial counsel. Neither do I underestimate the frustration counsel must have experienced with such a disruptive and uncooperative client. Nor do I question that the strategy taken by defense counsel was an effective one

reasonably calculated to help the defendant avoid the death penalty. Yet, I cannot accept that substantial evidence of guilt, a disruptive client, and an effective trial strategy can preempt the constitutional right of a defendant to the presumption of innocence and the requirement that a guilty plea be knowingly and intelligently entered. A plea of guilty cannot be entered to a judge or a jury without the defendant's consent. It is not a theoretical gloss or a hypothetical exercise to require that a defendant, no matter how gruesome or horrible his crime, how guilty he is, or how good the trial strategy, be accorded those rights. The courts have consistently required a judge to make inquiry and determine that a guilty plea is voluntarily, intelligently, and freely entered. We have developed a detailed rule setting forth specific procedures that courts must follow in making this determination. See Fla. R. Crim. P. 3.172. My research has not revealed a case where the failure to ensure that a defendant's plea of guilty was voluntary and intelligently entered was error subject to a harmless error analysis.

In the absence of certain knowledge of whether Nixon consented to counsel's strategy, the process for determining guilt or innocence was utterly flawed in this case. If Nixon did not consent, then a number of his constitutional rights were violated: he did not have a fair trial, he did not have effective representation, he was not seen as innocent until proven guilty, and the government was not held to its burden of establishing its case beyond a reasonable doubt. Despite his difficult behavior, Nixon was still entitled to his constitutional rights. Without the benefit of these rights, we can place no credence in the jury's verdict of guilt in this case. Any other conclusion would rend the very fabric from which our justice system was woven.

Aside from the merits, this case is troublesome because of the length of time it has taken for this Court to get to this point. The trial in this case occurred in 1985, yet the trial court's ruling on the 3.850 petition was not ripe for our review until the end of 1998. However troubling this may be, the amount of time this case has taken should in no way bear upon our ultimate decision on the

merits. No defendant should be denied the relief required simply because of delay.

For these reasons, I concur with the majority opinion.

ANSTEAD and PARIENTE, JJ., concur.

ANSTEAD, J., specially concurring.

I concur in Chief Justice Harding's opinion. The outcome of this case is controlled by the holding of the United States Supreme Court:

> [E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt.

Cronic, 466 U.S. at 656-57 n.19 (emphasis supplied). Obviously, a decision to "stand trial" was made here.

As to the issue concerning counsel's decision to, in essence, enter a plea of guilty without Nixon's consent, the dissent reminds us of the adage that "hard cases make bad law." When we decide cases, we must do so in accord with rules of law that apply to all cases, and therein lies one of the principle flaws in the dissenting opinion. That opinion fails to acknowledge, much less discuss, the rule of law concerning the entry of a guilty plea, and counsel's role and responsibility to her client if counsel believes that a guilty plea should be entered. Instead, it simply concludes this was a hopeless case with horrible facts; therefore, counsel should be free to do anything, including pleading the defendant guilty without the consent of the defendant.[6] As to the law, while the dissent

[6] In fact, the procedure advocated by the dissent here would be much worse and more prejudicial than the entry of a formal plea of guilty, because at least a formal plea would have foreclosed the State from presenting, during

apparently concludes that this defendant's case is hopeless, it ignores the cases to come, especially the ones that will arise if we were to adopt a rule of law that says counsel can make the decision as to a plea of guilty without the consent of the client. That is part of the "bad law" that would come from this "hard case" if we accepted the dissenting view.

The dissent also ignores the fact that the postconviction proceedings and enlargement of the record we previously mandated have never occurred. On direct appeal, we refused to deal with the competency of counsel claim because of the inadequacy of the record and with the express provision that it would be more properly resolved in a postconviction proceeding. See Nixon v. State, 572 So.2d 1336, 1340 (Fla. 1990). We know this not only because we expressly said so in Nixon, but also because we had the same issue arise in a subsequent case where we cited our holding in Nixon as one requiring an evidentiary hearing in a postconviction action. See Harvey v. Dugger, 656 So.2d 1253, 1256 (Fla. 1995). By approving the trial court's decision, we would be concluding that the same record that was declared inadequate by a unanimous court in 1990 has now become adequate to resolve this issue, and we would be overruling the holding of a unanimous court in the 1990 opinion. Further, we would be ignoring our prior explicit mandate in this very case, and ruling now, as a matter of law, that a lawyer is authorized to concede a defendant's guilt regardless of the defendant's views or input.

The record presented to us also reflects a serious issue as to Nixon's competency. Nixon's competency to stand trial first became an issue when he stood trial on an unrelated assault and

a trial on guilt, the extensive devastating evidence of guilt alluded to by the dissent. The kind of "guilty plea" allowed here to be entered by counsel alone gave the defendant the worst of all worlds: an admission of guilt plus the devastating evidence put on by the State during a guilt phase trial that was rendered unnecessary by counsel's guilty plea.

battery charge five months before his murder trial.[7] At that trial, Nixon's attorney raised the issue of his client's competency. That prompted the judge to request a psychologist, Dr. Carolyn Stimel, to examine Nixon. This examination occurred during the lunch hour of the proceedings and last approximately forty-five minutes. The evaluation did not consist of any psychological testing nor was a formal competency evaluation made. Notwithstanding, the assault trial continued.

The next time that Nixon's competency was discussed was during a pretrial conference in the murder case. At this pretrial conference, the state attorney was concerned about Nixon's competency and urged an examination. There is also evidence that months before trial, Dr. Ekwall opined that Nixon's intelligence was "on the law side of normal, but its adequate." Finally, in 1993, Nixon was examined by three different mental health experts, all three of whom opined that Nixon suffers from mental retardation and may have some form of organic brain damage or organic personality disorder. Despite these concerns, however, both parties essentially concede that no competency hearing was ever conducted.

Specifically, Dr. Henry Lee concluded that Nixon suffers from mental retardation and shows unmistakable evidence of Organic Personality Disorder. After evaluating Nixon, he found it surprising that no formal competency hearing was conducted in this case, especially given Nixon's bizarre conduct and statements prior to and during trial. He also found that in addition to the record information, the affidavits of several people, including an attorney skilled in defending the mentally ill, attest to Nixon's psychotic behavior. Dr. Denis William Keyes also concluded that Nixon is mentally retarded and suffers from evident brain damage. The psychological tests administered to Nixon place him below the lowest one percent of the population. Finally, Dr. Alec J. Whyte

[7] This assault trial involved the same counsel and was conducted before the same judge who presided over his murder trial.

opined that Nixon suffers from mental retardation and an organic personality disorder. He specifically noted that the process of a criminal trial was beyond Nixon's competence to comprehend, and that his behavior during the trial is evidence of his inability to comprehend what was occurring.

All three of these opinions were based in part on Nixon's behavior before and during trial. This behavior included Nixon's refusal to leave his cell during pretrial hearings, the removal of his clothing, and his hiding under the sheets of his bed when summoned by officials. Furthermore, two months before trial, Nixon wrote an incoherent letter to his attorney that appeared to demonstrate a severe mental imbalance.

Based primarily on the above evidence and evaluations of the mental health experts, Nixon alleged in his 3.850 motion that he was not competent to stand trial. Notwithstanding, the trial court summarily denied this claim, finding it procedurally barred. However, the record does not support this conclusion. On the contrary, the record reflects that at the very least, Nixon was entitled to an evidentiary hearing on whether he was competent to stand trial. See Peede v. State, 24 Fla.L.Weekly S391, S393 (Fla. Aug. 19, 1999); Jones v. State, 478 So.2d 346 (Fla. 1985). In fact, the State concedes that because the judge, prosecutor, and defense counsel in this case, as well as some of the experts who evaluated Nixon contemporaneously with the time of trial and who opined that a competency hearing was not necessary, are still available, a nunc pro tunc hearing could be held in this case. See Mason v. State, 489 So.2d 734 (Fla. 1986).

WELLS, J., dissenting.

I dissent.

A thorough review of the record and a plain reading of our opinion in Nixon's direct appeal leads me to the inescapable conclusion that Nixon's claim of ineffective assistance of counsel

is governed by Strickland v. Washington, 466 U.S. 668 (1984). Competent, substantial evidence supports the trial court's summary denial of Nixon's claim.

I begin my analysis with reference to the facts as set forth in this Court's opinion in Nixon v. State, 572 So.2d 1336 (Fla. 1990):

> At trial, there was testimony that after church on August 12, 1984, Ms. Bickner went to a local mall to have lunch with friends. She parked her orange M.G. convertible in the mall parking lot. Ms. Bickner was later seen in the parking lot giving a black man jumper cables from the trunk of her car. Witnesses testified that on the afternoon of August 12 they saw the orange M.G. driven by a black male, later identified as Nixon, near the vicinity of the site where the body was found. Ms. Bickner's body was discovered by a couple riding through the woods who reported the incident to the police. The charred body was in a seated position tied around the waist with jumper cables to a pine tree. Her left arm was tied to another pine tree. Wanda Robinson, John Nixon and other witnesses testified that they saw Nixon driving Ms. Bickner's orange M.G. Robinson and John Nixon also testified that Nixon admitted killing a white woman by tying her with jumper cables and burning her. Nixon also showed them two of Ms. Bickner's rings and later said he had pawned the rings. Robinson and John Nixon also testified that on the morning of the fourteenth, Nixon told them that he was going to burn the orange M.G. There was testimony that Nixon attempted to sell the M.G. prior to burning it. A pawn shop receipt signed by Nixon for two of Ms. Bickner's rings was entered into evidence. A laboratory analyst for the Florida

Department of Law Enforcement testified that Nixon's palm print was found on the trunk lid of Ms. Bickner's M.G.

After his arrest, in a taped confession which was played to the jury, Nixon admitted murdering Ms. Bickner. He described how he met Ms. Bickner at the mall and asked her to take him to his uncle's house because he was having car trouble. Once on the road, Nixon his Bickner in the face. When she stopped the car, Nixon put her in the trunk and then drove to a secluded wooded area where th took her from the trunk and tied her to a tree with jumper cables. According to Nixon, the two talked about their lives. Ms. Bickner offered to give Nixon money, to sign her car over to him, begging him not to kill her. Nixon recounted how he burned Ms. Bickner's personal belongings and then threw the top of the convertible into the fire. At some point after placing a paper bag over her head, Nixon threw the smoldering convertible top on Ms. Bickner, setting her on fire. He then left the scene in the M.G.

572 So.2d 1338.

I next note the following statements from the two able and experienced trial judges who were involved in this case. First, is the statement of Judge hall made at the close of the proceedings in 1985:

> One facet of the case that doubtless will come under examination is the tactics, strategy, analysis employed by defense counsel in this case.
>
> Trial court is uniquely situated in our judicial system. It's the only judicial officer that

sees the people that appear, and observes their demeanor, is able to see the impact that the case has upon the jury, observe that impact, and so forth, as the jury hears it. Privy to the evidence and privy to that evidence as it is presented in the courtroom.

Doubtless, there may be those who have reservations about the approach employed by trial counsel for the defense in this case.

It is my view that the tactic employed by trial counsel in this case was an excellent analysis of reality of his case and the preservation of his credibility and the credibility of any mitigating circumstances that could have been placed before the jury and before this Court, as to disposition.

It is my view, in view of the evidence in this case, the jury has found the defendant guilty by the establishment of evidence beyond and to the exclusion of any reasonable doubt. I think that the evidence, preparation of the case, presentation, would have persuaded any jury, not only beyond a reasonable doubt, but beyond all doubt.

For trial counsel to have inferred that Mr. Nixon was not guilty of these offenses would have deprived him of any credibility during the penalty phase, and to some extent, although professionalism would have detracted a little bit from it, under a sentencing hearing before the Court. I think the trial counsel's approach, the maintenance of credibility, his rapport with the jury, were the only realistic steps that could have been taken, in an effort to give some relief to his client.

A less experienced attorney, probably seeking to avoid criticism - either public, private or professional - would have tried the case differently, and probably would have left no hope at all for Mr. Nixon.

Mr. Cronin's approach, his analysis, his assessment, I think was right on the mark. I think that his approach has been conscientious and in diligent best interest to defend his client, Mr. Nixon.

Second, I note the statement of Judge Smith in ruling upon Nixon's Cronic[8] claim in the postconviction proceedings.

Finally, in respect to the trial record and the direct appeal, there are three matters which are crucial to my conclusion that the majority's decision is wrong:

1. Nixon was presumed to be mentally competent to stand trial. There was no determination by the trial court that he was incompetent, and no issue was raised on appeal that the trial court erred in failing to find him incompetent to proceed.

2. Nixon was extremely uncooperative during the trial. He refused to be in court on several occasions. He took off his clothes in his holding cell to thwart the proceedings. The trial judge went to the holding cell to try to get Nixon to attend and cooperate, but Nixon continued to be uncooperative.

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[8] United States v. Cronic, 466 U.S. 648, 654 (1984).

> 3. Even though Nixon was voluntarily absent from much of the trial, Nixon's trial counsel actively engaged in the trial, including conducting an extensive voir dire, objecting to photographs as unduly gruesome, and moving for a mistrial as to a portion of the State's closing in the guilt phase. In the penalty phase, Nixon's trial counsel presented the testimony of eight witnesses, including Nixon's mother and two mental health experts, a psychiatrist, and a psychologist. Nixon's trial counsel introduced substantial documentary evidence, including school, institution, and psychological reports concerning Nixon's life from 1972 to 1985.

What is plainly the reality of what we have here is a gruesome, horrible murder, confessed to by a competent but obstructive defendant who had experienced trial counsel who proceeded on the basis of a strategy which should be recognized as obviously the only rational legal strategy to try to keep a client out of the electric chair. I cannot join the majority in replacing this plain reality with a theoretical gloss that paints what occurred as if it were some hypothetical exercise which spurned constitutional rights. I cannot accept that our courts must ignore that which reasonable, objective analysis demonstrates is patently evident.

The legal issue before us is whether Nixon's claim of ineffective assistance of counsel is governed by the oft-applied test of Strickland or by dicta in Cronic, which suggests that an attorney, in remote instances, may act so detrimentally to his client's case as to result in a breakdown of the adversarial process and will be deemed prejudicial per se. If Strickland applies, rather than Cronic, then correct legal analysis dictates that the trial judge should be affirmed, not reversed, because competent, substantial evidence supports the trial court's legal ruling that Nixon has failed to establish the requisite prejudice.

I first point out that the decision of whether Cronic applies on this record was decided by this Court in 1990, when it entertained Nixon's direct appeal. Had this Court in 1990 concluded that Cronic applied, surely it would have applied it and not wasted these last nine years. The record before this Court now stands the same as the record before it when it first considered Nixon's Cronic claim in 1990. The trial court was correct in concluding that Strickland applied, for why else would the Court have sent the case on to postconviction proceedings? What the majority actually does is grant a rehearing of the 1990 decision by this Court, and that is wrong.

I also point out that the majority's decision is based on an overly expansive interpretation of Cronic. The majority's decision as to the application of Cronic is based on cases which either do not apply or cases whose reasoning have been justifiably criticized. The majority relies on cases from the Ninth and Tenth Circuits. See United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991), Osborn v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988). The First Circuit has rightfully rejected the expansive interpretation placed on Cronic in Swanson and Osborn. In Scarpa v. Dubois, 38 F.3d 1 (1st Cir. 1994), the First Circuit considered a case in which a lawyer argued a defense on behalf of his client which was tantamount to admitting guilt:

> As mentioned above, the district court relied primarily on dictum contained in United States v. Cronic, 466 U.S. at 658-60, 104 S.Ct. at 2046-47, for the proposition that, in the circumstances at bar, it could forgo an inquiry into actual prejudice. The Cronic Court stated that in rare instances prejudice might be presumed "without inquiry into counsel's actual performance at trial." Id. at 662, 104 S.Ct. at 2048 (dictum). But, the approach suggested in this statement is in all events the exception, not the rule - and it can been employed only if the record reveals

presumptively prejudicial circumstances such as an outright denial of counsel, a denial of the right to effective cross-examination, or a complete failure to subject the prosecution's case to adversarial testing. See id. at 659, 104 S.Ct. at 2047. The Cronic Court itself warned that, in most cases, a showing of actual prejudice remained a necessary element. See id. The Court stated: "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." Id. at 659 n.26, 104 S.Ct. at 2047 n.26.

For the most part, courts have been cautious in invoking the exception limned in the Cronic dictum. Cronic-like principles have been applied, for example, in situations in which defense counsel labored under an actual conflict of interest, see Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), or in which no attorney appeared despite a defendant's unwaived right to appointed counsel, see United States v. Mateo, 950 F.2d 44, 48-50 (1st Cir. 1991), or in which defendant's lawyer sat in total silence throughout the relevant proceeding, see Tucker v. Day, 969 F.2d 155, 159 (5th Cir. 1992) (involving resentencing); Harding v. Davis, 878 F.2d 1341, 1345 (11th Cir. 1989) (holding that defense counsel's muteness throughout trial, including his utter silence as the judge directed a verdict against his client, is per se prejudicial), or in which the defense attorney was absent from the courtroom during a critical part of the trial, see Green v. Arn, 809 F.2d 1247, 1259-64 (6th Cir.), cert. granted, vacated and remanded to consider mootness, 484 U.S. 806, 108 S.Ct. 52, 98 L.Ed.2d 17 (1987);

Siverson v. O'Leary, 764 F.2d 1208, 1217 (7th Cir. 1985), or, pre-Cronic, in which counsel snoozed through much of the proceedings, see Javor v. United States, 724 F.2d 831, 833 (9th Cir. 1984).

A few courts have extended the exception's boundaries beyond the circumstances surrounding representation and found that a lawyer's particular errors at trial may cause a breakdown in the adversarial system and thus justify invocation of the Cronic dictum. See Swanson, 943 F.2d at 1074 (holding that knowingly and explicitly conceding reasonable doubt in closing argument is per se prejudicial); Osborn, 861 F.2d at 628-29 (finding per se prejudice when defense counsel intentionally stressed the brutality of his client's crime, admitted that the evidence against his client was overwhelming, and made statements to the press that his client had no evidence to support his claims). We believe that these cases misperceive the rationale underlying the Cronic expression. In our view, the Court's language in Cronic was driven by the recognition that certain types of conduct are in general so antithetic to effective assistance - for example, lawyers who leave the courtroom for long stretches of time during trial are unlikely to be stellar advocates in any matter - that a case-by-case analysis simply is not worth the cost of protracted litigation. No matter what the facts of a given case may be, this sort of conduct will almost always result in prejudice. See Cronic, 466 U.S. at 658-59, 104 S.Ct. at 2046-47. But attorney errors particular to the facts of an individual case are qualitatively different. Virtually by definition, such errors "cannot be classified according to likelihood or causing prejudice" or "defined with sufficient precision to inform defense attorneys

correctly just what conduct to avoid." Strickland, 466 U.S. at 693, 104 S.Ct. at 2067. Consequently, the Court has declined to accord presumptively prejudicial status to them. See id.

We are not alone in our attempt to harmonize Cronic with Strickland by drawing an easily visible line separating those few cases in which prejudice may be presumed from the mine-run (in which actual prejudice must be shown). When confronted by particular errors on the part of defense counsel, best evaluated in the context of the defendant's trial, other federal courts have refused to march under the Cronic banner, and, instead, notwithstanding the seriousness of the errors, have performed both parts of the requisite Strickland analysis. Thus, in McInerney v. Puckett, 919 F.2d 350 (5th Cir. 1990), the defendant claimed that his lawyer's lack of preparedness and failure to raise an insanity defense justified the invocation of the Cronic dictum. See id at 352-53. In requiring a showing of prejudice, the Fifth Circuit noted that "bad lawyering, regardless of how bad, does not support the [per se] presumption; more is required." Id. at 353; see also United States v. Thompson, 27 F.3d 671, 676 (D.C. Cir. 1994) (finding no prejudice per se in defense counsel's failure to inform defendant before guilty plea that, as a career offender, he faced possible life imprisonment); United States v. Baldwin, 987 F.2d 1432, 1437-38 (9th Cir.) (finding no prejudice per se where attorney conceded his client's guilt at pretrial conference and neglected to request jury instruction on overt act requirement for conspiracy charge), cert. denied, 508 U.S. 967, 113 S.Ct. 2948, 124 L.Ed.2d 696 (1933); Woodard v. Collins, 898 F.2d 1027, 1028 (5th Cir. 1990) (requiring showing

of prejudice where defense counsel advised the accused to plead guilty to a charge that counsel had not investigated); United States v. Reiter, 897 F.2d 639, 644-45 (2nd Cir.) (applying full Strickland standard in spite of defendant's claim that counsel's errors were so pervasive as to amount to "no counsel at all"), cert. denied, 498 U.S. 990, 111 S.Ct. 533, 112 L.Ed.2d 543 (1990); Green v. Lynaugh, 868 F.2d 176, 177-78 (5th Cir.) (applying full Strickland analysis to attorney's decision to conduct "almost no investigation"), cert. denied, 493 U.S. 831, 110 S.Ct. 102, 107 L.Ed.2d 66 (1989); Henderson v. Thieret, 859 F.2d 493, 499 (7th Cir. 1988) (applying second prong of Strickland to attorney's lack of preparation in connection with sentencing), cert. denied, 490 U.S. 1009, 109 S.Ct. 1648, 104 L.Ed.2d 163 (1989); Gardner v. Ponte, 817 F.2d 183, 186-87 (1st Cir.) (refusing to extend Cronic to attorney's failure to object to jury instructions), cert. denied, 484 U.S. 863, 108 S.Ct. 181, 98 L.Ed.2d 134 (1987); State v. Savage, 120 N.J. 594, 577 A.2d 455, 466 (1990) (finding no prejudice per se in a capital case where counsel only met once with defendant). Similarly, in reviewing claims of ineffective assistance of counsel at the appellate level, courts have declined to apply Cronic to attorney errors that do not amount to the constructive absence of counsel. See, e.g., Hollenback v. United States, 987 F.2d 1272, 1276 & n.1 (7th Cir. 1993) (finding no per se prejudice in appellate counsel's citation to wrong provision of money-laundering statute); United States v. Birtle, 792 F.2d 846, 847-48 (9th Cir. 1986) (finding no per se prejudice when defendant's appellate counsel failed to appear at oral argument or file a reply brief).

> There authorities suggest that attorney error, even when egregious, will almost always require analysis under Strickland's prejudice prong. We agree. Thus, we decline to adopt the expanded version of Cronic embraced by the district court. Our reasons are manifold, but four of them are paramount.

38 F.3d at 11-14 (footnotes omitted) (emphasis added).

The Fifth Circuit has also been critical of the Ninth Circuit with regard to that court's interpretation of Cronic. In Childress v. Johnson, 103 F.2d 1221 (5th Cir. 1997), the court held:

> While gleaning insight from Swanson's statement of Sixth Amendment principles, we do not necessarily endorse its finding of a constructive denial of counsel. Defense counsel in Swanson failed to call witnesses and conceded in his closing argument that the evidence of his client's guilt was overwhelming. These appear to be trial errors amenable to Strickland analysis. See Scarpa v. Dubois, 38 F.2d 1, 12 (1st Cir. 1994) (criticizing Swanson), cert. denied, ___ U.S. ___, 115 S.Ct. 940, 130 L.Ed.2d 885 (1995).

103 F.3d 1229 n.12 (emphasis added). In Vines v. United States, 28 F.3d 1123 (11th Cir. 1994), the Eleventh Circuit stated:

> "Cronic's presumption of prejudice applies to only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all." Chadwick v. Green, 740 F.2d 897, 901 (11th Cir. 1984).

Id. at 1128 n.8.

No fair reading of the instant record can lead to the conclusion that Nixon was "denied any meaningful assistance at all." Id. This case must be analyzed in light of Florida's death penalty procedure. Counsel's performance must necessarily consider both the guilt and penalty phases. The trial record demonstrates that counsel made a rational choice, one that a competent, experienced lawyer would be expected to make given the evidence, which was to call no witnesses and emphasize the penalty phase. This was appropriately stated by Judge Hall in 1985, and this Court is wrong to ignore it in 1999.

I also dissent because I believe the majority's opinion, after more than nine years, creates a new standard for this case. The majority opinion states at page 14 (slip opinion): "[W]e conclude that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough." Is this to be "established" by a preponderance of the evidence - clear and convincing evidence - or to the exclusion of every reasonable doubt? Is a nod of the head sufficient, or does the majority actually require a Boykin[9] on-the-record acceptance to have been made? It appears to me that the majority is here dictating a new trial, only leaving to the trial judge the actual ordering of it.

This appears to me to dictate a new trial because the record has been clear for the fifteen years since this trial that during the trial Nixon set about not to "explicitly accept" anything. This was part and parcel of his disruptive and noncooperative conduct. If "explicit acceptance" per Boykin is the requirement, this Court should have so stated in 1990. If that had been correctly the issue then, this Court's majority at that time would have reversed for a new trial based on the record, which does not have a Boykin on-

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[9] Boykin v. Alabama, 395 U.S. 238 (1969).

the-record "explicit acceptance." However, the then unanimous majority did not do that. The present new majority confuses our procedure when it in actuality rehears and sets aside that decision. I conclude that it is harmful to the processing of capital cases generally when the majority of this Court erodes the distinction between direct appeal and postconviction relief for a particular case, as is being done here.

Finally, I believe this case again exemplifies why this Court must have a much better and more pro-active case management procedure in capital cases. If, as the majority now holds, the record had to contain "specific testimony," there is no justifiable explanation as to why it has taken a decade to determine whether that testimony exists or to require a new trial. Since I have been on this Court, I have repeatedly advocated that this Court actively case-manage these cases following the direct appeal. This case plainly demonstrates the past-due need for this Court to implement procedures for quarterly case management conferences in the trial courts with status reports reviewed each quarter by this Court and direction through the Chief Justice to the Chief Judge or each circuit in respect to cases in which appropriate progress in the adjudication of postconviction issues is not being made.

(2)

No. 03-931

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STATE OF FLORIDA,

Petitioner,

v.

JOE ELTON NIXON,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR THE RESPONDENT IN OPPOSITION

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January 29, 2004

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IN THE

Supreme Court of the United States

No. 03-931

STATE OF FLORIDA,

Petitioner,

v.

JOE ELTON NIXON,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE*

In 1985, Respondent Joe Elton Nixon was tried in a Leon County, Florida court for the first-degree murder of Ms. Jeanne Bickner. He was tried *in absentia* after he removed his clothes and refused to enter the courtroom. The trial judge examined him, stripped to his underwear and seated on a toilet in the holding cell, and found that he had voluntarily waived attendance at trial.[1] Although

* Throughout this document, citations to the record compiled below are in the same format as on the most recent appeal to the Supreme Court of Florida. "R." designates 12 volumes of record, numbered pages 1-2104; "3.850 R." designates 23 volumes of record, numbered pages 1-4393; and "A." designates an Appendix subsequently submitted by Nixon.

[1] The Florida Supreme Court explained:

> On July 8 and 9, 1985, Nixon refused to be present during a hearing on various pretrial motions. In both instances counsel waived Nixon's presence for the limited purpose of hear-

the prosecution had earlier sought "unsuccessfully, because of defense counsel's objection" to have Nixon evaluated psychiatrically to determine his competency to be tried,[2] neither party requested a hearing on Nixon's

ing the motions. Although Nixon was present at the commencement of jury selection on July 15, 1985, as voir dire continued on the morning of July 16, 1985, Nixon refused to enter the courtroom. Defense counsel explained to the judge that Nixon had disrobed to his underwear, and was demanding a black judge and a black attorney, and did not wish to return to the courtroom. After a recess, Nixon still refused to attend the trial. The trial judge then inquired of the bailiff as to why Nixon had not returned. The judge was informed that Nixon had told another officer that he was not going to court 'for them to railroad me.' Defense counsel informed the judge that Florida Rule of Criminal Procedure 3.180(b) allowed a defendant to voluntarily absent himself from the courtroom if the court chose to try Nixon in absentia. The trial court conducted a hearing in the holding cell to determine if it would be in Nixon's best interest to allow him to absent himself from the proceedings. During the hearing, Nixon was clad only in his underwear. He reiterated to the judge that he did not wish to return to the courtroom, that he wanted another attorney and wanted to return to the jail-house. Nixon threatened that if forced to return to the courtroom, 'I still [sic] run my mouth and speak when I get ready unless you tape it up.' Nixon repeatedly stated that he wanted to return to the jail-house and did not care if the trial proceeded without him. After questioning the officer who had transported Nixon from the jail to the holding cell concerning the events leading up to appellant's removal of his clothes and desire to return to the jail-house, the trial court indicated that if Nixon did not return to the courtroom that afternoon, the court would consider his decision 'to be a knowledgeable, voluntary and intelligent waiver of his right to be present during the course of the trial.' When Nixon refused to return to the courtroom that afternoon, the court found that Nixon had knowingly, intelligently, and voluntarily waived his attendance and that the proceedings would continue without him.

Nixon v. State, 572 So. 2d 1336, 1341 (Fla. 1990).

[2] At a pre-trial conference on February 28, 1985, the prosecutor requested a determination of Nixon's competency to be tried, saying

competency to absent himself from trial, and the court did not address that issue.[3]

Trial on Nixon's plea of not guilty therefore began and proceeded in his absence. In opening argument at the guilt phase of the trial, defense counsel Michael Corin conceded to the jury that Nixon had committed the murder with which he was charged and that this would be proved to the jury's satisfaction beyond a reasonable doubt. Corin did not contest the prosecution's case at trial in any way,[4] and in closing argument he reiterated that "the State has proved beyond a reasonable doubt each and every element of the crimes charged; first-degree premeditated murder, kidnapping, robbery, and arson." R. 641. The jury returned a verdict of guilty on all counts and, following a penalty trial from which Nixon

that "the real issue" in the case would "revolve around" Nixon's mental competency. R. 899. Defense counsel resisted, saying, "I am not going to waste the time and energy to have a client examined as to competency or insanity when I am not of the professional opinion that that is relevant." R. 900. Later in the hearing, the prosecutor again urged an examination, adverting to Nixon's aberrant behavior in an unrelated assault trial held about two weeks earlier, involving the same prosecutor, defense attorney, and judge. The judge said, "Yes. I was seeing enough that made me wonder, too," R. 910, but nevertheless declined to have Nixon examined. (During the assault trial, the judge had had Nixon examined by a psychologist for 45 minutes during the lunch break. The psychologist had reported no reason to halt the trial. In the present post-conviction proceedings, she submitted an affidavit stating that she had neither performed psychological testing nor made a formal competency evaluation of Nixon during the lunch break. *See* Affidavit of Carolyn Stimel, Ph.D.; 3.850 R. 716-17; A-315-16.)

[3] On direct appeal from Mr. Nixon's conviction and death sentence, the Florida Supreme Court upheld the trial court's factual finding that Mr. Nixon had made a voluntary waiver of his right to attend his trial. 572 So. 2d at 1342. No issue of Mr. Nixon's competency to make such a waiver was presented on the appeal.

[4] Corin did not ask a single question of most of the State's 33 witnesses. He cross-examined a few perfunctorily. After the State rested, he rested for the defense without calling a witness or making any motions. R. 609.

remained absent, recommended a death sentence. The crime was a ghastly one, and the trial judge sentenced Nixon to death.

On direct appeal, Nixon, through new counsel, contended that "he was denied effective assistance of counsel when his trial counsel, without record approval of Nixon, conceded Nixon's guilt and sought leniency." *Nixon v. State*, 572 So. 2d 1336, 1338-1339 (Fla. 1990) ["*Nixon I*"]. The Florida Supreme Court remanded the case to the trial court "for an evidentiary hearing to determine whether Nixon was informed of the strategy to concede guilt and seek leniency," *id.* at 1339, and later issued a clarifying order and a second remand in an effort to determine the relevant facts, *id.* at 1339-1340. Eventually, it gave up the effort, recognizing "the confusion resulting from our remand for these atypical proceedings" and it "decline[d] to dispose of this claim [on direct appeal] on the present state of the record which . . . [was] less than complete." *Id.* at 1340. Instead, it authorized Nixon to pursue the issue in post-conviction proceedings. *Id.*

Nixon did so, again contending that "he did not give his attorney consent to enter a guilty plea or agree to allow his attorney to undertake a trial strategy in which guilt would be admitted . . . [and] that as a result of . . . [counsel's unauthorized] comments [conceding his guilt in opening and closing argument], he was denied effective representation." *Nixon v. Singletary*, 758 So. 2d 618, 620 (Fla. 2000) ["*Nixon II*"]. The state post-conviction court rejected this claim without an evidentiary hearing, and the Florida Supreme Court then reversed. *Id.* It observed that:

> At his arraignment, Nixon entered a 'not guilty' plea. By pleading 'not guilty,' Nixon exercised his right to make a statement in open court that he intended to hold the State to strict proof beyond a reasonable doubt as to the offenses charged. *See Byrd v. United States*, 342 F.2d 939, 941 (D.C. Cir. 1965); *Licata v. State*, 81 Fla. 649, 651, 88 So. 621, 622 (1921). "Unquestionably, the constitutional right of a criminal defendant to plead 'not guilty,' or perhaps more accurately not to plead guilty, entails the obligation of his attorney to structure the trial of the case around his client's plea." *Wiley* [*v. Sowders*], 647 F.2d [642] at 650 [6th Cir. 1981]. (*Nixon II*, 758 So. 2d at 623-624.)

But, the Florida Supreme Court found, Nixon's "[trial] counsel's comments were the functional equivalent of a guilty plea." *Id.* at 624. And:

> this Court has stated that '[d]ue process requires a court accepting a guilty plea to carefully inquire into the defendant's understanding of the plea, so that the record contains an affirmative showing that the plea was intelligent and voluntary.' *Koenig v. State*, 597 So. 2d 256, 258 (Fla.1992). *See also* Fla. R.Crim. P. 3.172. (*Nixon II*, 758 So. 2d at 624.)

Thus, "we conclude that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy." *Id.*

A further evidentiary hearing on this issue was required because, although "the 1990 Court [on direct appeal] . . . [had e]ssentially . . . issued an invitation to Nixon to raise this issue again in his 3.850 motion," and "[i]mplicit within that invitation was that the post-conviction circuit court conduct another evidentiary hearing . . . [,] the circuit court in the present post-conviction motion refused to grant an evidentiary hearing, and this Court still does not have the answer that it has been seeking for the last eleven years." *Id.*

In handing down this ruling, the Florida Supreme Court "emphasize[d] that the Strickland standard normally applies to ineffective assistance of counsel claims." *Id.* at 622, referring to *Strickland v. Washington*, 466 U.S. 668 (1984). It said that the rule of *United States v. Cronic*, 466 U.S. 648, 654 (1984), which permits a criminal defendant to establish ineffective assistance of counsel without the inquiry into prejudice demanded by *Strickland* "only applies to the narrow spectrum of cases where the defendant was completely denied effective assistance of counsel." *Id.* Therefore,

> [t]o determine which test applies, we must first decide whether Nixon's trial counsel 'entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing.' *Cronic*, 466 U.S. at 659 . . . . Trial counsel's statements during opening and closing arguments raise a question as to whether Nixon's trial counsel did, in fact, fail to subject the State's case to meaningful adversarial testing. . . . Therefore, if Nixon can establish that he did not consent to counsel's strategy, then we would find counsel to be ineffective *per se* and *Cronic* would control. (*Id.* at 622—23.)

While remanding Nixon's case for further evidentiary hearing, the Florida Supreme Court undertook to avert litigation of the constitutional issue in other, future cases by announcing a routine procedure for Florida criminal prosecutions tried after its *Nixon II* decision (January 27, 2000): "[I]n the future, . . . if a trial judge ever suspects that a similar strategy is being attempted by counsel for the defense, the judge should stop the proceedings and question the defendant on the record as to whether or not he or she consents to counsel's strategy."[5]

[5] *Id.* at 625. The relevant passage is set out in full at page 10 *infra*.

On remand to the Circuit Court for Leon County, the post-conviction hearing judge received evidence and "[i]n essence . . . found that Nixon's failure to approve or disapprove verbally was approval of counsel's strategy." *Nixon v. State*, 857 So. 2d 172, 176 (Fla. 2003) ["*Nixon III*"]. The Florida Supreme Court, in the decision which the State now seeks to have reviewed on *certiorari*, examined the entire record, discerned "no competent, substantial evidence which establishes that Nixon *affirmatively* and *explicitly* agreed to counsel's strategy," *id.*, and therefore ordered a new trial.

SUMMARY OF ARGUMENT

This case presents no "important federal question" (Rule 10 (b), (c)) warranting *certiorari*. The decision below reaffirms an earlier ruling of the same court on the same issue, handed down in January of 2000. That was a narrow ruling to begin with, and subsequent decisions of the Florida courts have limited it to its facts. Unsurprisingly, in the four years since January of 2000, the federal aspects of that decision have affected only five cases in Florida and none anywhere else. In the future, they will almost certainly affect no cases anywhere because in Florida they have been displaced by a state-law prophylactic rule designed to keep the issue from arising and completely successful to date. The state-law prophylactic rule has become a settled drill, efficient and beneficial to the Florida courts, inimical to no one's interests and to no federal concern. It represents the kind of state-law development averting any need for federal constitutional adjudication that a federal system should encourage, not upset.

The *certiorari* petition argues that this case could be an apt vehicle for consideration of more general issues of consequence beyond Florida which need resolution by this Court. That is not so. The Florida Supreme Court

decision itself involves an admixture of state law and federal constitutional law that has no applicability outside Florida. And in its federal aspects the case involves rules for adjudicating ineffective-assistance-of-counsel claims that this Court has recently reviewed several times and settled as clearly as they can be settled, given their heavily fact-dependent character. The lower courts are having no trouble applying the rules; no need appears for the Court to revisit the area so soon.

ARGUMENT

1. The Florida Supreme Court decision immediately at issue here, decided on July 10, 2003 and reported at 857 So. 2d 172, involves nothing more than the fact-bound determination that the Circuit Court for Leon County erred in finding on the record as a whole that Joe Elton Nixon affirmatively consented to his trial lawyer's concessions of guilt in opening and closing argument. The petition for *certiorari* does not seek review of that finding. It seeks review of the legal ruling of the Florida Supreme Court on Nixon's earlier post-conviction appeal—*Nixon II*, decided on January 27, 2000 and reported at 758 So. 2d 618—which frames the factual controversy decided in the present 2003 appeal. In *Nixon II*, the Florida Supreme Court held that Nixon's rights to the effective assistance of counsel and to a trial on his plea of not guilty would be violated if, without his effective consent, his lawyer told his jury that he was guilty beyond a reasonable doubt of every element of the capital crime of first degree murder.

2. As this holding suggests, *Nixon II* was a narrow decision from the outset. Its extremely narrow compass has been confirmed by subsequent Florida decisions holding explicitly that:

- *Nixon II* does not apply when defense counsel concedes the defendant's guilt of lesser included offenses. *Atwater v. State*, 788 So. 2d 223 (Fla. 2001); *Lawrence v. State*, 831 So. 2d 121 (Fla. 2002); *Jones v. State*, 845 So. 2d 55 (Fla. 2003).
- *Nixon II* does not apply when defense counsel concedes the defendant's guilt of a subset of charges in a multiple-count indictment. *Griffin v. State*, 28 Fla. L. Weekly Supp. 723 (Fla. 2003).
- *Nixon II* does not apply when defense counsel concedes the defendant's guilt in one of several alternative theories that counsel presents to the jury. *State v. Williams*, 797 So. 2d 1235 (Fla. 2000).
- *Nixon II* does not apply when defense counsel's concessions fall short of conceding that each and every element of the offense charged has been established, so that the defendant's guilt is complete. *Thompson v. State*, 839 So. 2d 847 (Fla. App. 2003).

In light of these limitations, it is not surprising that, in the four years since *Nixon II* was decided, the Florida appellate courts have granted only one criminal defendant a new trial under the *Nixon II* ruling. *Harvey v. State*, 28 Fla. L. Weekly Supp. 513 (Fla. 2003). In four other cases—all in the Florida District Courts of Appeal—post-conviction hearings were granted to determine whether a Nixon II violation occurred, but two of these cases are probably no longer good law in the light of a subsequent decision of the Florida Supreme Court further narrowing *Nixon II*.[6]

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[6] *See Hinton v. State*, 854 So. 2d 254 (Fla. App. 2003); *Cooper v. State*, 835 So. 2d 1250 (Fla. App. 2003); *Smallwood v. State*, 809 So. 2d 56 (Fla. App. 2002); *Childers v. State*, 782 So. 2d 513 (Fla. App. 2001). The *Smallwood* and *Hinton* decisions have apparently been overruled by the later decision of the Florida Supreme Court in *Griffin*, *supra*, that *Nixon II* does not apply when counsel concedes a defendant's guilt of some counts in a multiple-count indictment.

3. As we will see in a minute, the *Nixon II* decision represents an amalgam of federal constitutional Fifth and Sixth Amendment law and ancillary Florida state procedural rules. Expanding the state-law component of this compound, the Court in *Nixon II* explicitly prescribed a routine, mandatory prophylactic procedure to be used by Florida trial courts in future situations (*i.e.*, those occurring after January 27, 2000) in which similar issues appeared to be arising:

> [I]n order to avoid similar problems in the future, we hold that if a trial judge ever suspects that a similar strategy is being attempted by counsel for the defense, the judge should stop the proceedings and question the defendant on the record as to whether or not he or she consents to counsel's strategy. . . . This will ensure that the defendant has in fact intelligently and voluntarily consented to counsel's strategy of conceding guilt.

Nixon, 758 So. 2d at 624-25. Thus, in the narrow class of cases to which *Nixon II* potentially applies, the procedure to be followed has been specified for the past four years and for the future as a standard drill which is regularly, easily, and economically performed and, once performed, avoids further problems, unclarities, or risks of reversible error. Not only are there no reported Florida appellate cases finding *Nixon II* error in any trial proceeding conducted since January 27, 2000, but there are no reported Florida appellate decisions in which trial proceedings conducted after January 27, 2000, have even been called into question under *Nixon II*.

4. The *Nixon II* prophylactic drill has become a standard feature of local Florida practice. *See* FLORIDA JURISPRUDENCE 2D §§ 1722 and 968 (Oct. 2003). It has been incorporated as a routine procedure by the Florida trial bar and judiciary. Florida judges and practitioners are

now habituated to using it; and—as has been the experience elsewhere under similar routine procedures[7]—it avoids troublesome appeals and post-conviction proceedings and the need to litigate constitutional issues. There is no good reason to upset this well-functioning Florida procedure now by reassessing the federal constitutional-law underpinnings of *Nixon II*, even if these were questionable.[8]

6. And there is a deeper reason not to do so. *Nixon II* marked no innovation in Florida criminal procedure or jurisprudence. Relying partly on the federal constitutional rule of *Boykin v. Alabama*, 395 U.S. 238 (1969), and partly on state law,[9] the Florida courts had earlier developed

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[7] For example, North Carolina—to which the Florida Supreme Court in *Nixon II* looked in fashioning its prophylactic drill—has operated under a similar routine procedure since 1985. *See State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985). It has become the standard practice in North Carolina criminal cases to conduct an on-the-record colloquy in which the defendant explicitly consents whenever defense counsel has in fact obtained the defendant's agreement to a concession of guilt and intends to proceed accordingly. *See, e.g., State v. McDowell*, 329 N.C. 363, 407 S.E.2d 200 (1991); *State v. McNeill*, 346 N.C. 233, 485 S.E. 2d 284 (1997); *State v. Berry*, 356 N.C. 490, 573 S.E.2d 132 (2002); *State v. Perez*, 135 N.C. App. 543, 522 S.E.2d 102 (1999); *State v. Leggett*, 149 N.C. App. 977, 563 S.E.2d 310 [table] (2002); *cf. State v. Strickland*, 346 N.C. 443, 488 S.E.2d 194 (1997); *State v. Leeper*, 356 N.C. 55, 565 S.E.2d 1 (2002). As a result, claims of ineffective assistance of counsel based on concessions of guilt are easily and efficiently dispatched on direct appeal, with the appellate courts simply pointing to the on-the-record colloquy to show that the defendant consented to the concession.

[8] *Cf. Dickerson v United States*, 530 U.S. 428, 443 (2000) ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture. *See Mitchell v. United States*, 526 U.S. 314, 331-332 (1999) (SCALIA, J., dissenting) (stating that the fact that a rule has found "'wide acceptance in the legal culture'" is 'adequate reason not to overrule' it)."). *See also Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992); *Quill Corp. v. North Dakota*, 504 U.S. 298, 317 (1992).

[9] The seminal opinion in *Koenig v. State*, 597 So. 2d 256 (Fla. 1992), to which we shall refer in text in a moment, relied on both

a standard procedure for explicit inquiry by the trial judge and an "affirmative showing" on the record of a criminal defendant's intelligent waiver of any basic trial right. This began with the right to plead not guilty—the subject of *Koenig v. State*, 597 So. 2d 256 (Fla. 1992), on which the court in *Nixon II* placed central reliance[10]—and was subsequently extended to other rights deemed fundamental in the Florida context, including some that have no federal constitutional grounding.[11] Such a devel-

Boykin and Florida Criminal Rule 3.172, set out in part in note 10 *infra*. *Id.* at 258.

[10] *See* 758 So. 2d at 624:

> In *Boykin v. Alabama*, 395 U.S. 238 . . . (1969), the Supreme Court held that a defendant may not enter a guilty plea unless that plea is intelligent and voluntary . . . . Consequently, this Court has stated that '[d]ue process requires a court accepting a guilty plea to carefully inquire into the defendant's understanding of the plea, so that the record contains an affirmative showing that the plea was intelligent and voluntary.' *Koenig v. State*, 597 So. 2d 256, 258 (Fla. 1992). *See also* Fla. R. Crim. P. 3.172.

Florida Rule of Criminal Procedure 3.172 provides that before accepting a guilty plea, a trial judge must ensure that it is voluntary entered and that there is a factual basis for it. *See* Fla. R. Crim. P. 3.172(a). It further provides, in subsection 3.172(c):

> the trial judge should, when determining voluntariness, place the defendant under oath and shall address the defendant personally and shall determine that he or she understands: . . . ¶ (3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made and that the defendant has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to compel attendance of witnesses on his or her behalf, the right to confront and cross-examine witnesses against him or her, and the right not to be compelled to incriminate himself or herself.

[11] *See, e.g., Ashley v. State*, 614 So. 2d 486, 488 (Fla. 1993) (vacating a habitual-offender sentence on a guilty plea because the record did not affirmatively show that defendant personally knew his sentence could be lengthened due to the habitual-offender statute); *State v. Upton*, 658 So. 2d 86, 88 (Fla. 1995) (holding that a lawyer's written

opment, by which systematic state procedures are deployed to protect state-law and federal constitutional rights alike and to avoid the necessity for constant resort to adjudication of constitutional issues—like those which the State seeks to raise by its petition for *certiorari* here—are the hallmark of a healthy federalism and should be encouraged rather than undermined by this Court.[12]

waiver of jury trial on behalf of a client cannot validly waive the client's right to trial by jury where there is no affirmative showing in the record that the client agreed to the waiver); *Blair v. State*, 698 So. 2d 1210, 1213-14 (Fla. 1997) (reaffirming *Upton* in holding that a defendant can waive the right to a six-person jury if but only if the record shows an affirmative, personal, on-the-record waiver after adequate advice of the right); *Wallace v. State*, 722 So. 2d 913, 914 (Fla. App. 1998) (holding that a conviction following a lawyer's waiver of a six-person jury on behalf of his client could not be sustained under *Blair* because the record did not affirmatively show that the client was aware of his right to be tried by a jury of six and personally waived it); *Babb v. State*, 736 So. 2d 35, 36-37 (Fla. App. 1999) (reversing a conviction on a count on which defendant's lawyer waived a jury trial for the client because there was no affirmative showing in the record that the client made a knowing, voluntary, intelligent waiver of the right to trial by jury, as required by *Upton*); *Kelly v. State*, 797 So. 2d 1278, 1280 (Fla. App. 2001) (holding that defendant did not validly waive trial by jury because there was no affirmative showing in the record that he made a knowing, voluntary, intelligent waiver of the right as required by *Upton*). This practice has roots in state law preceding *Koenig*. *See LaMadline v. State*, 303 So. 2d 17, 20 (Fla. 1974) (reversing a death sentence because the record did not affirmatively show that defendant voluntarily, intelligently waived his right to a jury recommendation).

[12] Our federalism depends on a vital, ongoing dialogue between federal and state "courts equally bound to guard and protect rights secured by the Constitution." *Ex parte Royall*, 117 U.S. 241, 251 (1886). The role of the state judiciary in developing effective means to implement federal constitutional guarantees alongside parallel, partly overlapping state-law guarantees has been frequently recognized by this Court. *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 490-91 (1973); *Rose v. Lundy*, 455 U.S. 509, 515 (1982); *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). Giving ample scope to that role reduces federal constitutional violations *ab initio*, federal constitutional claims *ex post*, and the burden placed upon the federal judiciary by both. *See* Harry T. Edwards, *The Rising Work Load and Perceived 'Bureaucracy' of the Feder-*

7. The petition for *certiorari* suggests that—putting Florida aside—a "conflict in the federal courts . . . respecting the interpretation of the per se rule of United States v. Cronic, 466 U.S. 648 (1984)] . . . is a valid basis for this Court to grant *certiorari* in this case." Petition for Certiorari, p. 25.[13] The purported "conflict" to which the

al Courts: A Causation-Based Approach to the Search for Appropriate Remedies, 68 IOWA L. REV. 871, 903-917 (1983). It also reduces the number of occasions when recourse must be had to federal constitutional adjudication—by any court, state or federal—on a case-by-case basis; and of course the "best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity," *Parker v. Los Angeles County*, 338 U.S. 327, 332 (1949); *see, e.g., Liverpool, New York & Philadelphia Steamship Co. v. Comm'r of Emigration*, 113 U.S. 33, 39 (1885). All of these considerations support the model of federalism reflected in Justice O'Connor's concurring opinion in *Cruzan v. Director*, 497 U.S. 261, 292 (1990), under which the "task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the 'laboratory' of the States," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 . . . (1932) (Brandeis, J., dissenting), in the first instance."

[13] In the same sentence, the petition argues that "as well, the conflict between the decision of the Supreme Court of Florida and the Eleventh Circuit's . . . decision [in *Parker v. Head*, 244 F.3d 831 (11th Cir. 2001)] is a valid basis for this Court to grant certiorari. . . " Petition, p. 25. This submission reads the word "important" out of Rule 10 (b) and exemplifies the basic failing of the petition, which is to assume that *certiorari* is appropriate whenever a state court's decision of a federal question (without regard to its importance) is open to dispute. To be sure, if a federal circuit court of appeals in a habeas corpus proceeding *sustains* a recurring federal constitutional claim that has been *rejected* by the highest court of a state within that circuit, the resulting potential for discord may make the disputed question important on that very account. *See, e.g., Schirro v. Summerlin*, No. 03-526. But where a federal circuit court of appeals *rejects* a federal constitutional claim that is *accepted* by the highest court of a state within the circuit, the conflict is no more significant than if the highest court of any of the 50 States decided a federal issue inconsistently with any of the 12 federal circuit courts of appeals. Every such inconsistency could hardly be regarded as an occasion for *certiorari*; and where, as here, the issue which is the subject of the pretended inconsistency is *not* recurrent (*see* pages 7-9 *supra*) the case for *certiorari* is vacuous. (We say "pre-

petition adverts appears to be that the "Fifth and First Circuit Courts of Appeal [in 1997 and 1994 respectively] have criticized decisions of the Ninth and Tenth Circuits [in 1991 and 1988 respectively], concluding that these cases have misperceived the rationale underlying *Cronic*." (Petition, p. 23; *see* generally *id.* at pp. 22-25.) Even if a decade-old inter-Circuit conflict of this sort might, under some circumstances, warrant granting *certiorari* in a *state* case, it cannot do so here. For this Court has only recently decided three cases, *Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *Mickens v. Taylor*, 535 U.S. 162 (2002); and *Bell v. Cone*, 535 U.S. 685 (2002), which together thoroughly explored and explicated the rationale and reach of *Cronic*, and there is no reason to suppose that the Court needs to revisit the subject a fourth time in four years in order to provide adequate guidance for the lower federal courts. To the contrary, any fair scan of recent Court of Appeals decisions demonstrates beyond question that the Court's delineation and restriction of the scope of *Cronic* in *Flores-Ortega*, *Mickens* and *Bell* have had a powerful, pervasive impact[14] that is uniform across the Circuits, *see, e.g., Ellis*

tended inconsistency" because, in fact, there is no conflict—let alone any "direct conflict" (Petition, p. 23)—between the Florida Supreme Court decision in *Nixon II* and the Eleventh Circuit decision in *Parker*. The Eleventh Circuit in *Parker* did not reach the merits of any constitutional claim; it merely held that the resolution of *Parker*'s claim by the Georgia courts was not unreasonable for purposes of federal habeas review under 28 U.S.C. § 2254(d)(1).)

[14] In *Haynes v. Cain*, 298 F.3d 375 (5th Cir. 2002), for example, the 5th Circuit *en banc* reversed a pre-*Bell* panel decision granting relief under *Cronic* (*Haynes v. Cain*, 272 F.3d 757 (5th Cir. 2001)), finding that "the Supreme Court clarified the scope of the second *Cronic* exception to *Strickland* in *Bell v. Cone*." 298 F.3d at 376. *See also Freeman v. Graves*, 317 F.3d 898 (8th Cir. 2003), and *United States v. White*, 341 F.3d 673 (8th Cir. 2003), both reversing, after *Bell*, pre-*Bell* district court decisions granting relief; *Ouber v. Guarino*, 293 F.3d 19, 32-33 (1st Cir. 2002), rejecting, after *Bell*, a district court's pre-*Bell* reliance on *Cronic*; and *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968, 970-72

v.United States, 313 F.3d 636 (1st Cir. 2002); *Solis v. United States*, 252 F.3d 289 (3rd Cir. 2001); *Glover v. Miro*, 262 F.3d 268 (4th Cir. 2001); *United States v. Jackson*, 327 F.3d 273 (4th Cir. 2003); *Johnson v. Cockrell*, 301 F.3d 234 (5th Cir. 2002); *Sherrod v. Tennessee*, 61 Fed. Appx. 936 (6th Cir. 2003); *United States v. Holman*, 314 F.3d 837 (7th Cir. 2002); *Headley v. Mueller*, 59 Fed. Appx. 188, 189 (9th Cir. 2003);[15] *Charm v. Mullin*, 37 Fed. Appx. 475, 480 (10th Cir. 2002);[16] *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000).[17]

CONCLUSION

A decision of the Florida Supreme Court on a subject so thoroughly and recently canvassed by this Court can have no conceivable impact outside Florida. Insofar as it invokes federal constitutional law, this particular decision of the Florida Supreme Court will have no future impact inside Florida, either. As Justice Frankfurter wrote

(N.D. Ill. 2002) reversing, on rehearing after *Bell*, the court's own pre-*Bell* reliance on *Cronic*.

[15] Headley argues that the California courts and the district court failed to apply the correct controlling authority by imposing Strickland' s requirement that he demonstrate prejudice rather than presuming prejudice under *Cronic*. But prejudice is very rarely presumed. The Supreme Court reiterated in *Bell v. Cone*, 535 U.S. 685 . . . (2002), that prejudice is presumed only '"if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing,"' *Bell*, 122 S.Ct. at 1851 (*quoting Cronic*, 466 U.S. at 659) (emphasis added in *Bell*). Headley's trial attorney did not entirely fail to challenge to prosecution's case.

59 Fed. Appx. at 189.

[16] "To be entitled to relief under *Cronic*, 'the attorney's failure must[, instead,] be complete.' *Bell v. Cone* . . . ." 37 Fed. Appx. at 480.

[17] The few cases that have applied *Cronic* since *Bell* have been limited to the first *Cronic* exception, involving the "complete denial of counsel" because counsel was absent during a critical stage of the proceeding, *Cronic*, 466 U.S. at 659. *See Mitchell v. Mason*, 325 F.3d 732 (6th Cir. 2003); *French v. Jones*, 332 F.3d 430 (6th Cir. 2003).

for the Court on a relevant occasion, the "'[s]pecial and important reasons' [required to justify a grant of *certiorari*] imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). There are no non-academic, non-episodic reasons to justify *certiorari* or constitutional adjudication in the present case. The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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(3)

Case No. 03-931

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,

Petitioner,

v.

JOE ELTON NIXON,

Respondent.

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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Case No. 03-931

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,

Petitioner,

v.

JOE ELTON NIXON,

Respondent.

In his response to the Petition for Writ of Certiorari, Respondent asserts this case presents no "important federal question," because it is a narrow ruling, confined to its facts, that will have no affect on future cases in Florida. Indeed, he argues, the "prophylactic rule" announced by the Florida Supreme Court has become a "settled drill" which need not be "upset" at this juncture, even if the constitutional underpinnings of the decision below "were questionable." Petitioner will reply briefly to these assertions, in the same order as presented by Respondent in his Argument.

1. Respondent asserts, first, that the decision "immediately at issue here" involves merely a "fact-bound" determination of consent, as to which Petitioner does not seek review. Brief for the Respondent in Opposition (hereafter Response) at 8. While it is true, as Respondent asserts, that Petitioner seeks review of the legal standard announced in Nixon

II and applied in Nixon III,[1] Petitioner also seeks review of the determination by the court in Nixon III overturning the finding of waiver by the circuit court on remand. See Petition, Part 1(D), pp 27-29. Nor is this determination "fact-bound," as Respondent contends. There is no dispute about the facts; Petitioner's contention (set out in the Petition) is that the Florida Supreme Court applied the wrong Constitutional standard, and that its decision is in conflict with decisions of this Court and of lower federal courts.

2. Respondent next argues that "Nixon II was a narrow decision from the outset," and will have little or no impact in Florida. On the contrary, the decision in Nixon II is having a significant impact in Florida, as evidenced by very number of cases Respondent cites addressing, and granting relief on, Nixon issues in the short time that Nixon II has been decided.[2]

3. Respondent argues in Paragraphs 3 and 4 of his Response that Nixon II is an "amalgam" of federal and state law, and that the "mandatory prophylactic procedure" crafted in Nixon II has become a "standard feature of local Florida practice" to which "Florida judges and practitioners are now habituated," and will prevent similar issues from arising in the future, as evidenced by the lack of reported appellate decisions in which "trial proceedings conducted after January 27, 2000" have been called in question.

The legal issue addressed in Nixon II, however, was a strictly federal constitutional issue, which the Florida Supreme Court resolved by its (erroneous) application and interpretation of this Court's decisions in Strickland v. Washington, 466 U.S. 668 (1984); United States v. Cronic, 466 U.S. 648 (1984); and Boykin v. Alabama, 395 U.S. 238 (1969). Further, the "prophylactic procedure" adopted by the Florida Supreme Court itself implicates federal issues, unnecessarily "meddling in the attorney-client relationship," Taylor v. United States, 287 F.3d 658 (7th Cir. 2002), and imposing the kind of "mechanical rules" on counsel criticized by this Court in Strickland and since.[3]

Nor can it be said that the Nixon II "prophylactic drill" (Response at 10) has become a "routine" procedure to which the bench and bar are now habituated, or that it will "avoid similar problems." Respondent, whose counsel does not practice in Florida, supports these assertion only with an alleged absence of reported decisions calling into question trials conducted after January 27, 2000. However, defendants tried since that date simply have not completed the postconviction proceedings at which they would attack effectiveness of trial counsel. As for

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[1] As noted in the Petition, Nixon II refers to Nixon v. State, 572 So.2d 1336 (Fla. 2000), while Nixon III is Nixon v. State, 857 So.2d 172. Respondent made no argument on the merits in his response to the petition for writ of certiorari in Nixon II, but argued only that Nixon II was not a final decision. See Brief of Respondent in opposition, Case. No. 00-396. As to the federal issues presented in the instant Petition, Nixon III is a final decision, and Respondent does not contend otherwise.

[2] As noted in the Response, four appellate decisions have ordered evidentiary hearings, while one defendant has obtained a new trial based on the rule set out in Nixon II. Moreover, there are no boundaries that the Florida Supreme Court will not traverse nor lower appellate courts abide with in regard to the expansion of Cronic's standard, contrary to this Court's recent decisions cited in Paragraph 5 of this Reply. At a minimum, the Florida Supreme Court should be required to apply this Court's recent decisions to Respondent's case.

[3] Arguably, if a defendant were to stand mute during such "prophylactic" inquiry, the trial court would be obliged under Nixon II (which requires "affirmative" and "explicit" acceptance, "in words," of counsel's strategy) to order counsel to change his strategy, no matter how ultimately beneficial counsel or the court might deem that strategy to be. Moreover, Respondent's reliance on North Carolina's practices to resolve a claim of ineffective assistance of counsel (Response at 11, n. 4) does not answer any question raised here.

cases tried before 2000, a case is now pending in the Florida Supreme Court, and scheduled for oral argument this week, in which a Nixon concession-of-guilt issue has been raised despite the trial court having tried to conduct the same "prophylactic" questioning later prescribed in Nixon II; the court's attempt to do so was stymied by the defendant's refusal to answer the court's questions.[4] Petitioner would assert that the "prophylactic drill" envisioned by the Florida Supreme Court is not yet "routine," and, even if it becomes so, it will not prevent Nixon issues from arising in the future.[5]

4. In his paragraph 6 (there is no paragraph 5 in the Response), Respondent argues that Nixon II "marked no innovation in Florida criminal procedure or jurisprudence," because it merely applied to trial counsel's strategic decision standards previously developed for resolving the voluntariness of guilty pleas. Petitioner deems such application a significant "innovation" of law; further, this argument utterly fails to address the merits of the issue posed by Petitioner, which is whether the Florida Supreme Court erred by treating concessions of fact by counsel to be the functional equivalent of a guilty plea.

5. Finally, Respondent argues that there is no present conflict in the federal courts; according to him, the cases cited by Petitioner are old, and recent cases from this Court (i.e., Roe v. Flores-Ortega, 528 U.S. 470 (2000); Mickens v. Taylor, 535 U.S. 162 (2002); and Bell v. Cone, 535 U.S. 685 (2002)) have had a "powerful, pervasive" impact that is "uniform across the Circuits." Response at 15. Regardless of the impact of this Court's decisions on the lower federal courts, however, it is obvious that this Court's recent decisions have had no "powerful, pervasive impact" on the Florida Supreme Court, which simply ignored these decisions, as Petitioner noted in its Petition. Even if there is no present inter-circuit conflict in the federal courts, the decision below clearly conflicts with decisions of this Court and with decisions of the lower federal courts, as set out in the Petition.

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[4] See Dillbeck v. State, Case No. SC02-2044, scheduled for oral argument on February 3, 2004. The appellate briefs in Dillbeck are a public record, available online at the website of the Florida Supreme Court. Dillbeck's trial occurred before the decision in Nixon II, but after Nixon's trial, and Dillbeck's trial judge was aware that an issue raised in Nixon's direct appeal had been his counsel's concession of guilt without his consent.

[5] As demonstrated by Harvey v. State, 28 Fla. L. Weekly S513 (Fla. July 3, 2003)(pending on motion for rehearing), the potential scope of the *per-se* effectiveness standard of Nixon II extends well beyond explicit concessions of guilt. Harvey's counsel vigorously contested his guilt of first degree murder, but was found to be ineffective *per se* under the standard of Nixon II because he conceded certain incontestable facts, and merely argued that those facts did not establish Harvey's guilt. Thus, under Nixon II, trial courts in Florida arguably must obtain a defendant's express consent to *any* concession of fact and, without such, order defense counsel to contest that fact, whether or not doing so would be in the defendant's best interests.

CONCLUSION

Noticeably absent from the Response is any argument that the Florida Supreme Court below correctly applied this Court's precedents. It did not. Moreover, that court's decision has had and will continue to have far-reaching impact on criminal trials in Florida. The standard announced and applied by the court below is erroneous and in direct conflict with this Court's precedents, for all the reasons set out in the Petition and in this Reply, and Petitioner would respectfully ask this Court to grant the Petition.

Respectfully submitted,

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of trial (both parties) 99-209

Jury 10-2 death recommendation
July 25, 1985 210

Defense motion for new trial
July 29, 1985 211-212

Transcript of remand proceedings
December 19, 1988 213-268

VOLUME II

Transcript of remand proceedings
Opening colloquy and evidence
August 30, 1989 269-357

Opinion on direct appeal (Nixon I) 358-377

Order summarily denying motion for
postconviction relief 378-392

Opinion (Nixon II) 393-427

Transcript of Evidentiary Hearing
on Remand, May 11, 2001 428-525

Opinion (Nixon III) 526-562

Denial of Rehearing (Nixon III) 563

Relevant Docket Entries

Indictment ..... August 29, 1984

Jury Trial (selection of the jury through
recommendation of sentence) ..... July 15-25, 1985

Decision of Florida Supreme Court,
Direct Appeal (Nixon I) ..... November 29, 1990

Motion for Postconviction Relief ..... October 7, 1993

Trial Court's Summary Denial of
Postconviction Relief ..... October 22, 1997

Decision of Florida Supreme Court Remanding
for Evidentiary Hearing (Nixon II) ..... January 27, 2000

Evidentiary Hearing on Remand ..... May 11, 2002

Decision of Florida Supreme Court Granting
New Trial (Nixon III) ..... July 11, 2003

Order Denying Rehearing ..... October 1, 2003

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-CF-2324

STATE OF FLORIDA, :

v. :

JOE ELTON NIXON, :

Defendant. :

_____ :

DEMAND FOR DISCOVERY

Defendant hereby demands that the prosecutor disclose to defense counsel and permit defense counsel to inspect, copy, test and photograph the information and material specified in Florida Rules of Criminal Procedure 3.220(a) (1) and (2).

In addition, defendant requests that the prosecutor disclose to defense counsel any prior inconsistent statements of state witnesses; promises or assurances to any witnesses of immunity, leniency, or recommendations of a specific sentence in the instant case; promises or assurances to any witnesses of leniency or reward in other criminal prosecutions or investigations; threats to prosecute any witness; all information pertaining to pending or prior formal charges or prior convictions of any state witness in the outcome of the instant case; all information regarding bias or prejudice of any state witness toward defendant; whether any eyewitness, even though not called by the state, has identified someone other than the

defendant as perpetrator of the crime; and descriptions of the perpetrator of the crime which do not match the defendant.

_____
MICHAEL M. CORIN
OFFICE OF THE PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

(Certificate of Service omitted in printing)

84-2324 CASE NUMBER

STATE OF FLORIDA

vs.

JOE ELTON NIXON,

Defendant(s).

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

ANSWER TO DEMAND FOR DISCOVERY

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, pursuant to defendant's DEMAND FOR DISCOVERY and Florida Rule of Criminal Procedure 3.220, and furnishes the following:

1. The names and addresses of all persons know to the prosecutor at the present time to have information which may be relevant to the offense charged and to any offense with respect thereto are –

See Attached Exhibit "A"

2. Listed below are the statements of witnesses whose names were furnished in #1 above and copies of said statements or reports are not attached to defense counsel's copy of this Answer.

See Attached Exhibit "B"

3. There are **not** written or recorded statements of the defendant and copies are not attached to defense counsel's copy of this Answer.

The defendant did **not** make oral statements to the following persons, and the substance of those statements is listed below.

STATEMENTS MADE TO	SUBSTANCE OF STATEMENT
Wise/Campbell	Admitted murder (see reports for details)
John Nixon	Admitted murder
Wanda Robinson	Admitted murder

4. There are not written or recorded statements of codefendants and copies are not attached to defense counsel's copy of this Answer. The codefendant(s) did not make oral statements to the following persons, and the substance is listed below.

STATEMENTS MADE TO	SUBSTANCE OF STATEMENT

5. There is not recorded Grand Jury testimony of the defendant.

6. There are tangible items which were obtained from or belong to the defendant and are described below.

Photograph, fingerprints, boots, clothes, blood, hair, signatures, comb, knife, charm, assorted coins, wallet with contents

7. Information relative to the offense was not provided by a confidential informant.

8. There was not electronic surveillance of the premises of the defendant or of conversation to which the defendant was a party.

9. There was **not** a search and seizure and documents related to any search and seizure are not attached.

10. There are ~~not~~ reports or statements of experts, and copies of said reports or statements are not attached to defense counsel's copy and listed below.

Autopsy report
Toxicology report

11. The tangible evidence known to the prosecutor in addition to items mentioned in #6 preceding is listed below.

See Attached Exhibit "C"

Defense counsel is hereby permitted, at a time and place mutually agreed upon by counsel for the State and for the defense, or as otherwise ordered by the Court, to inspect, copy, test and/or photograph the foregoing statements, documents, test results, and/or tangible items of evidence.

12. The State has herein submitted its complete ANSWER TO DEMAND FOR DISCOVERY pursuant to F.R.Cr.P. 3.220 and respectfully demands the defense to submit its corresponding witness list within seven days and disclose to the State and permit them to inspect, copy, test and/or photograph the information and material in the defendant's possession or control as listed in FRCrP 3.220 within fifteen days after receipt of this ANSWER TO DEMAND FOR DISCOVERY.

DONALD S. MODESITT
STATE ATTORNEY - SECOND JUDICIAL CIRCUIT

_____
JAMES C. HANKINSON
Assistant State Attorney

(Certificate of Service omitted in printing)

EXHIBIT "A"

1. Wayne and Debbie Connell - 5300 Williams Rd. #4
2. Johnnie Lewis Tucker - 2710 Country Club, Apt. #46
3. John Nixon - c/o Paul Phillips
4. Wanda Robinson - 910 Millard St.
5. Willie James Harris - 1810 Pasco St., #5
6. James Edward Nixon - Rt. 2, Box 230, Hinson Heights, Havana
7. Virginia Ann Meeks - Rt. 2, Box 230, Hinson Heights, Havana
8. Pamela Sperling - 2731 Blairstone Rd., Apt. 157
9. Jeff Attaberry - TPD
10. Mary Attaberry - 2725 Vassar Rd.
11. Gregory A. Cleary - 5618 Hoover Ct.
12. Susan T. Cleary - 5618 Hoover Ct.
13. Ted Cox - 2201 Jim Lee Rd.
14. Jim Turvaville - c/o Acme New and Used Auto Parts, Inc., 170 Capital Circle S.E.
15. Thomas Igles- 2022 Martin Luther King Blvd.
16. Franklin L. Jones - 4905 Buck Lake Rd.
17. Mary L. Todd - 1112 S. Magnolia #D-101
18. Judith Hill - 1810 Pasco St., Apt. 5
19. Evelyn Harris - 1810 Pasco St., Apt. 5
20. Henry Hunter, III - 1810 Pasco St., Apt. 5
21. Linda Gallagher - 1009 Paul Russell Rd.
22. Mary Louise Still - Rt. 12, Box 923, Oakridge Rd.
23. David Bickner - 2226 Pontiac Dr.
24. Jo Ann Plachy - 2713 DeBussey Ct.
25. Deputy Sturmer - LCSO
26. Deputy Coughlin - LCSO
27. St. Ash - LCSO
28. Det. Livings - LCSO
29. Det. Miller - LCSO
30. Sgt. Daws - LCSO
31. Sgt. Gunter - LCSO
32. Deputy Koester - LCSO

33. Deputy Fox - LCSO
34. Capt. Dale Wise - LCSO
35. Major Larry Campbell - LCSO
36. Dick Simpson - LCSO
37. Deputy Carroll Hurdle - LCSO
38. Det. Paul Phillips - LCSO
39. Deputy Lee - LCSO
40. Trooper W.E. Glass - FHP, Crestview
41. Capt. Brett - T.F.D.
42. D/C Love - T.F.D.
43 Dr. Ben Turner - Medical Examiner's Office
44. Nayola Darby - FDLE
45. Karen Cooper - FDLE
46. Dr. John H. Hebb - International Clinical Lab, 5 Park Plaza, Nashville, Tenn.
47. Dr. James Patty - 1541 Medical Dr., Suite 120-A

EXHIBIT "B"

Reports

Deputy Sturmer (3 pgs)
Deputy Hubbard (1 pg)
Trooper W.E. Glass - FHP - (1 pg)
Capt. Brett (2 pgs)
Det. Livings - (13 pages)
Det. Livings - (1 pg)
Det. Miller - (7 pgs)
Det. Phillips (11 pgs.)
Sgt. Daws (4 pgs)
Capt. Wise (4 pgs)
Sgt. Ash - (4 pgs)
Major Campbell (12 pgs.)
Sgt. Gunter (5 pgs)
Deputy Hurdle (3 pgs)
Deputy Koester (3 pgs)
Deputy Koester (1 pg)
Deputy Fox (3 pgs)

Statements

John Nixon (2)
Wanda Robinson (2)
Mary and Jeff Attaberry
Virginia Meeks
Judith Hill
James Nixon
Willie James Harris
Dr. James Patty

EXHIBIT "C"

(Crime scene)

Prior court files
Initial scene
- See chain of custody list items #1- #21
Photo line-up
Soil sample
M.G. convertible and contents
Pictures of victim
Consent form
Victim's hands
Latents from M.G.
Photographs
Flow chart
Driver s license application
Pawn shop ticket
Rings (2)
Diagrams (2)
Governor's Square Mall
Sales Ticket
Sears battery
Vehicle registration
Brown bag with red and white shirt
Car keys
Tire casing
Gas cap
Miranda form
Victim's fingerprints
Shoes with socks
Blue jeans and other assorted tools
Crime scene sketches
Time cards - LCSD
Swabs from victim
Latent prints from victim's apt.
Pictures of tire tracks

Pictures of shoe tracks

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324

STATE OF FLORIDA

vs. AMENDED ANSWER TO
DEMAND FOR DISCOVERY

JOE ELTON NIXON,

Defendant.

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and files this Amended Answer to Demand for Discovery. The State's Answer to Demand for Discovery is amended to include the following:

Item No. 1:

Sandra Brooks
Chief of Personnel and Training
2590 Executive Center Circle East
Berkley Bldg., Room 108
Tallahassee, FL

Doug Barrow
FDLE

Dennis Counsel
University Pawn Shop
Tallahassee, FL

DONALD S. MODESITT
STATE ATTORNEY

JAMES C. HANKINSON
Assistant State Attorney

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324

STATE OF FLORIDA

vs.

JOE ELTON NIXON,

Defendant.

AMENDED ANSWER TO
DEMAND FOR DISCOVERY

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and files this Amended Answer to Demand for Discovery. The State's Answer to Demand for Discovery is amended to include the following:

Item No. 1:

Ann Council (juvenile), 1513 S. Magnolia Dr.
Doretha Mungen, FDLE
Norma Clouser, Dept. of Highway Safety
Custodian of Records, Division of Driver's License,
Department of Highway Safety

Item No. 2:

Copies of the following statements are attached:

1. John Dixon and Wanda Robinson
2. Jeff Attaberry
3. Mary Attaberry
4. Virginia Meeks
5. Judith Hill

6. James Nixon
7. Willie James Harris
8. Pamela Sperling

Item No. 10:

Report by Karen Cooper dated 9/27/84 (attached)
Report by Doretha Mungen dated 9/24/84 (attached)

Item No. 11:

Copy of pawn ticket (attached)

DONALD S. MODESITT
STATE ATTORNEY

JAMES C. HANKINSON
Assistant State Attorney

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324

STATE OF FLORIDA

vs.

JOE ELTON NIXON,

Defendant.

AMENDED ANSWER TO
DEMAND FOR DISCOVERY

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and files this Amended Answer to Demand for Discovery. The State's Answer to Demand for Discovery is amended to include the following:

Item No. 1:

James L. Outland, FDLE

Item No. 10:

Report by James Outland

DONALD S. MODESITT
STATE ATTORNEY

JAMES C. HANKINSON
Assistant State Attorney

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324

STATE OF FLORIDA

vs.

JOE ELTON NIXON,

Defendant.

AMENDED ANSWER TO
DEMAND FOR DISCOVERY

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and files this Amended Answer to Demand for Discovery. The State's Answer to Demand for Discovery is amended to include the following:

Item No. 11:

State of Florida employment applications of victim. (attached)

DONALD S. MODESITT
STATE ATTORNEY

JAMES C. HANKINSON
Assistant State Attorney

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324

STATE OF FLORIDA

vs.

JOE ELTON NIXON,

Defendant.

AMENDED ANSWER TO
DEMAND FOR DISCOVERY

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and files this Amended Answer to Demand for Discovery. The State's Answer to Demand for Discovery is amended to include the following:

Item No. 11:

Driver's license records
Prior booking cards (Leon County Jail)
Note to Joe Davis (items #2 and #3 are items previously identified by James Outland for handwriting comparison)

WILLIAM N. MEGGS
STATE ATTORNEY

JAMES C. HANKINSON
Assistant State Attorney

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324

STATE OF FLORIDA

vs.

JOE ELTON NIXON,

Defendant.

AMENDED ANSWER TO
DEMAND FOR DISCOVERY

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and files this Amended Answer to Demand for Discovery. The State's Answer to Demand for Discovery is amended to include the following:

Item No. 1:

Wanda Robinson
2501 Holton Street, Apt. D 220
Tallahassee, FL

Thomas Igles
2525 Texas Street, Apt. H-223
Tallahassee, FL

Hugo C. Pribor, M.D., Ph.D. or his designated assistant
5 Park Plaza
Post Office Box 70
Nashville, Tenn.

Correctional Officer Tony Revell
Leon County Jail

Barbara Fields
Division of Child Services
HRS
Ambassador Building, Apalachee Parkway
Tallahassee, FL

Item No. 3:

Thomas Igles — Admitted murder

Item No. 10:

Dr. Patty's office record (copy attached)

Item No. 11:

Death certificate

WILLIAM N. MEGGS
STATE ATTORNEY

JAMES C. HANKINSON
Assistant State Attorney

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324

STATE OF FLORIDA

vs.

JOE ELTON NIXON,

Defendant.

AMENDED ANSWER TO
DEMAND FOR DISCOVERY

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and files this Amended Answer to Demand for Discovery. The State's Answer to Demand for Discovery is amended to include the following:

Item No. 1:

Wanda Jones, Program Manager
Tallahassee Housing Authority
2940 Grady Road
Tallahassee, Florida 32312

WILLIAM N. MEGGS
STATE ATTORNEY

JAMES C. HANKINSON
Assistant State Attorney

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324-CF

STATE OF FLORIDA,

v.

JOE ELTON NIXON,

Defendant.

DEFENDANT'S ANSWER TO DISCOVERY

The Defendant, JOE ELTON NIXON, by and through the undersigned attorney, and pursuant to Rule 3.220(b)(3), Florida Rules of Criminal Procedure, provides the State with a list of witnesses (additional address information to be supplied when available);

Betty Nixon, 1700 Joe Louis Street, Apt. 178,
Tallahassee, Florida

Mattie Ingram, Blakely, Georgia

Marie Wembley, 330 Arlington Street,
Blakely, Georgia

Minister Nixon, Hinson Heights, Havana, Florida

John Nixon, Gordon River Apartments, #10-E
Naples, Florida

Vera Lee Igles, 637 Church Street, Blakely,

Georgia

Wayne Wallace, HRS, Tallahassee, Florida

Bob Newkirk, HRS, Tallahassee, Florida

Fletcher Pye, 4800 St. Augustine Road,
Tallahassee, Florida

Tom Igles, 2525 Texas Street, Apt. H-223
Tallahassee, Florida

Wanda Robinson, 2501 Holton Street, Apt. D-220
Tallahassee, Florida

Correctional Officer W. Forrest, Leon County Jail

Correctional Officer M. Carter, Leon County Jail

Lamar Nixon

Paul Nixon

Doris Nixon

Virginia Nixon Meeks, Hinson Heights,
Havana, Florida

Thomas Nixon

Joseph Nixon

John D. Nixon, c/o Det. Paul Phillips, Leon
County Sheriff's Department

Ivey Nixon

Deputy James Clifton, Leon County Sheriff's Office

Tracey Moulton, Blakely, Georgia

Antoinette Thomas, Oak Ridge Road, Woodville, Florida

Mother Jackson, Church of Christ Written in Heaven, either Woodville, Florida, or 108 Henderson Road, Tallahassee, Florida

Patricia Brown

JoAnn Slay, Post Office Drawer 391, Quincy, Florida 32351

Charlie Cook, Probation Officer, Quincy, Florida

Steve Kaufman, Probation Officer, Tallahassee, Florida

Pursuant to Rule 3.2209(b)(4)(iii) of the Florida Rules of Criminal Procedure, and furnishes the following list of tangible papers:

Records - Pineview Elementary School, Tallahassee, Florida

Records - Nims Middle School, Tallahassee, Florida

Records - Godby High School, Tallahassee, Florida

Records - Coastal Lumber Company, Havana, Florida

Records - Dozier School for Boys, Marianna, Florida

Records - HRS Halfway House, Holly Hills, Florida

Records - Jack Eckerd Camp, Milton, Florida

Court Records - Blakely, Georgia (Early County, Georgia)

Court Records - Juvenile and Felony Divisions, Circuit Court, Leon County, Florida

Court Records - Circuit Court, Gadsden County, Florida

County Jail Records, Leon County, Florida

County Jail Records, Gadsden County, Florida

County Jail Records, Early County, Georgia

Records from the Department of Corrections, Tallahassee, Florida

Records from the Leon County Sheriff's Department, Tallahassee, Florida

Records from the Criswell House, Tallahassee, Florida

Respectfully submitted,

MICHAEL M. CORIN
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324-CF

STATE OF FLORIDA,

v.

JOE ELTON NIXON,

Defendant.

DEFENDANT'S AMENDED ANSWER
TO DEMAND FOR DISCOVERY

COMES NOW the Defendant, JOE ELTON NIXON, through his undersigned attorney and pursuant to Rule 3.220(b)(3) of the Florida Rules of Criminal Procedure, and provides the State with the following list of additional witnesses:

Robbie Adams
School Records Section
Leon County Schools
Tallahassee, Florida

Brian Henry
Leon County Sheriff's Department

Linda Johnson
Leon County Sheriff's Department

Respectfully submitted,

MICHAEL M. CORIN
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324-CF

STATE OF FLORIDA,

v.

JOE ELTON NIXON,

Defendant.

DEFENDANT'S AMENDED ANSWER
TO DEMAND FOR DISCOVERY

COMES NOW the Defendant, JOE ELTON NIXON, through his undersigned attorney and pursuant to Rule 3.220(b)(3) of the Florida Rules of Criminal Procedure, and provides the State with the following list of additional witnesses:

Marla Hayes
Arthur G. Dozier School for Boys
Marianna, Florida

Elbert Dennis (present address unknown)

Dr. Daniel A. Kauffman (present address unknown)

Dr. Griswold (present address unknown)

Mr. Peeples
Assistant Principal
Nims Middle School
Tallahassee, Florida

Mrs. Dia Moore
Nims Middle School
Tallahassee, Florida

Sandra A. Walsh (present address unknown)

Tom Heiman (present address unknown)

Andrew T. Dozier (present address unknown)

L.T. Pittman
Arthur G. Dozier School for Boys
Marianna, Florida

James Strong
Arthur G. Dozier School for Boys
Marianna, Florida

Steve Mullis (present address unknown)

Lennox E. Williams
HRS
Panama City, Florida

Roy C. McKay
Arthur G. Dozier School for Boys
Marianna, Florida

William Cummings
HRS
Tallahassee, Florida

Wendy Mills
Apalachee Community Mental Health Services
Tallahassee, Florida

Elizabeth Stribling

Apalachee Community Mental Health Services
Tallahassee, Florida

G.C. Omer, III, Psychologist
Reception and Medical Center
Lake Butler, Florida

J.F. Mowbray
Reception and Medical Center
Lake Butler, Florida

B.J. Hardouwin
Classification Specialist
Reception and Medical Center
Lake Butler, Florida

F. Simmons
Classification Specialist
Reception and Medical Center
Lake Butler, Florida

J.C. Wolfe
Classification Specialist
Baker Correctional Institution
Olustee, Florida

J.J. O'Hern
Baker Correctional Institution
Olustee, Florida

R.D. Jones
Baker Correctional Institution
Olustee, Florida

Mr. Fish
Baker Correctional Institution
Olustee, Florida

Pursuant to Rule 3.220(b)(4)(iii) of the Florida Rules of Criminal Procedure, and furnishes the following list of tangible papers:

Records from the Cedar Halfway House
Holly Hills, Florida

Records from the Seminole Group Treatment House
Goldenrod, Florida

Records from the Eckerd Camp - E-MA-CHAMEE
Milton, Florida

Records from the Apalachee Community Mental
Health Services
Tallahassee, Florida

Respectfully submitted,

MICHAEL M. CORIN
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32301
(904) 488-2458

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324

STATE OF FLORIDA

vs.

JOE ELTON NIXON,

Defendant.

AMENDED ANSWER TO
DEMAND FOR DISCOVERY

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and files this Amended Answer to Demand for Discovery. The State's Answer to Demand for Discovery is amended to include the following:

Item No. 11:

FDLE Lab report dated February 4, 1985 (copy attached).

WILLIAM N. MEGGS
STATE ATTORNEY

JAMES C. HANKINSON
Assistant State Attorney

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-23240-CF

STATE OF FLORIDA,

v.

JOE ELTON NIXON,

Defendant.

DEFENDANT'S AMENDED ANSWER
TO DEMAND FOR DISCOVERY

COMES NOW the defendant, JOE ELTON NIXON, through his undersigned attorney and pursuant to Rule 3.220(b)(3) of the Florida Rules of Criminal Procedure, and provides the State with the following list of additional witnesses and/or updated addresses:

Tom Heiman
c/o The Guidance Clinic
Milton, Florida

Andrew Dozier
Behavior Specialist
Florida State Hospital
Chattahoochee, Florida

Elbert Dennis
Bay County School Board
Panama City, Florida

The following witnesses last known address was in care of Camp E-MA-CHAMEE, Route 1, Box 178A, Milton, Florida 32570:

Nancy Cupit
Rebecca Braxton
Segred Belcher
Lou Barrington
Keith Paulk
Tony Starnes
David VanSuol
Tom Range

Respectfully submitted,

MICHAEL M. CORIN
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324

STATE OF FLORIDA,

vs.

JOE ELTON NIXON,

Defendant.

AMENDED ANSWER TO
DEMAND FOR DISCOVERY

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and files this Amended Answer to Demand for Discovery. The State's Answer to Demand for Discovery is amended to include the following:

Item No. 1:

Mary Reynolds
1521 Mission Road

Ernest Gene Kilpatrick
806 Coble Dr.

All witnesses listed by the defense.

WILLIAM N. MEGGS
STATE ATTORNEY

JAMES C. HANKINSON
Assistant State Attorney

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324

STATE OF FLORIDA,

vs.

JOE ELTON NIXON,

Defendant.

AMENDED ANSWER TO
DEMAND FOR DISCOVERY

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and files this Amended Answer to Demand for Discovery. The State's Answer to Demand for Discovery is amended to include the following:

Item No. 1:

Officer Eldridge, TPD

Officer Debra Riley, TPD

WILLIAM N. MEGGS
STATE ATTORNEY

ANTHONY S. GUARISCO, JR.
Assistant State Attorney

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
AND FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324-CF

STATE OF FLORIDA,

v.

JOE ELTON NIXON,

Defendant.

DEFENDANT'S AMENDED ANSWER TO DISCOVERY

The defendant, JOE ELTON NIXON, by and through the undersigned attorney, and pursuant to Rule 3.220(b)(3), Florida Rules of Criminal Procedure, provides the State with the following list of additional witnesses.

1. Dr. M.L. Ekwall
   1889-20 Professional Park Circle
   Tallahassee, Florida 32308

2. Dr. Alan L. Doerman
   1126 Lee Avenue
   Tallahassee, Florida 32303

Pursuant to Rule 3.220(b)(4)(iii), Florida Rules of Criminal Procedure, the defendant furnishes the following list of tangible papers:

1. Report of Dr. M.L. Ekwall dated June 17, 1985.

2. Report of Dr. Alan L. Doerman dated June 4, 1985.

Respectfully submitted,

MICHAEL M. CORIN
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324

STATE OF FLORIDA,

v.

JOE ELTON NIXON,

Defendant.

AMENDED ANSWER TO DEMAND FOR DISCOVERY

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and files this Amended Answer to Demand for Discovery. The State's Answer to Demand for Discovery is amended to include the following:

Item No. 1:

Jim Story
Early County Sheriff's Office
South Franklin Blvd
Blakely, Ga. 31723

Mike Thomas
203 E. South Blvd
Blakely, Ga. 31723

Harris Hodges
Dept. of Corrections
Blakley, Ga. 31723

WILLIAM N. MEGGS
STATE ATTORNEY

ANTHONY S. GUARISCO, JR.
Assistant State Attorney

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324

STATE OF FLORIDA,

vs.

AMENDED ANSWER TO
DEMAND FOR DISCOVERY

JOE ELTON NIXON,

Defendant.

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and files this Amended Answer to Demand for Discovery. The State's Answer to Demand for Discovery is amended to include the following:

Item No. 1:

Theresa Kolanko, 1420 Fisher Lane, Apt. D, Tallahassee

Dr. John B. Sanders, 216 Ausley Road, Tallahassee

Charles Brantley, Division of Motor Vehicles, Dept. of Highway Safety, Tallahassee

Norma Clouser, Division of Motor Vehicles, Dept. of Highway Safety, Tallahassee

Clay Keith, Division of Drivers License, Dept. of Highway Safety, Tallahassee

Alan Cochran, Division of Drivers License, Dept. of Highway Safety, Tallahassee

Capt. Joe Davis, LCSD (Jail)

Fletcher Pye, 4800 St. Augustine Rd., Tallahassee

Det. Carl Bennett, LCSD

Det. John Franklin, LCSD

W. Forrest, LCSD (Jail)

M. Carter, LCSD (Jail)

Betty Durr, FDLE

WILLIAM N. MEGGS
STATE ATTORNEY

ANTHONY S. GUARISCO, JR.
Assistant State Attorney

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324

STATE OF FLORIDA,

vs.

JOE ELTON NIXON,

Defendant.

AMENDED ANSWER TO
DEMAND FOR DISCOVERY

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and files this Amended Answer to Demand for Discovery. The State's Answer to Demand for Discovery is amended to include the following:

Please find attached a tentative list of evidence for use at trial. Please contact the undersigned if there are any questions or to examine these items.

WILLIAM N. MEGGS
STATE ATTORNEY

JAMES C. HANKINSON
Assistant State Attorney

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324

STATE OF FLORIDA,

vs.

JOE ELTON NIXON,

Defendant.

AMENDED ANSWER TO
DEMAND FOR DISCOVERY

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and files this Amended Answer to Demand for Discovery. The State's Answer to Demand for Discovery is amended to include the following:

Item No. 1:

Johnny Danzy, Leon County Sheriff's Department
(for identification of known prints only)

WILLIAM N. MEGGS
STATE ATTORNEY

JAMES C. HANKINSON
Assistant State Attorney

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324-CF

STATE OF FLORIDA,

v.

JOE ELTON NIXON,

Defendant.

DEFENDANT'S AMENDED ANSWER TO DISCOVERY

The Defendant, JOE ELTON NIXON, through the undersigned attorney, provides the State with the attached tentative list of defense exhibits numbered 1 through 49. You have copies of all exhibits. Please advise immediately if it will be necessary for me to subpoena records custodians for any of the documents listed.

Respectfully submitted,

MICHAEL M. CORIN
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

(Certificate of Service omitted in printing)

IN RE: State of Florida v. Joe Elton Nixon
Case No. 84-2324-CF

List of tentative defense exhibits:

1. Complaint card from the Leon County Sheriff's Office; Complaint Card #84-26683.

2. Dr. Doerman's report.

3. Dr. Ekwalls' report.

4. California Achievement Test dated December 30, 1975, and February 20, 1976.

5. Presentence Investigation from Gadsden County Circuit Court, Case No. 81-88.

6. Presentence Investigation Report from Leon County Circuit Court, Case No. 83-2939.

7. Order of Probation from Early County, Georgia, Case No. 80-0085.

8. Test report dated May 1, 1975, from Frank Walker Associates from documents supplied by Camp E-MA-CHAMEE.

9. Discharge Summary dated August 1975 from Camp E-MA-CHAMEE.

10. Transfer Summary dated August 19, 1974, from Seminole Group Treatment Home to Camp E-MA-CHAMEE.

11. Prefurlough Study dated August 18, 1975, prepared by Newkirk and Cummings.

12. Eckerd Camper application form dated March 25, 1974, prepared by Newkirk.

13. Family Conference Report dated August 30, 1974, prepared by Braxton, Camp E-MA-CHAMEE.

14. Evaluation Report dated May 14, 1974, prepared by Segrid Belcher, Camp E-MA-CHAMEE.

15. Special Conference Report prepared by Nancy Cupit, undated, Camp E-MA-CHAMEE.

16. Family Conference Report dated August 22, 1975, prepared by Nancy Cupit, Camp E-MA-CHAMEE.

17. Family Conference Report dated March 28, 1975, prepared by Nancy Cupit, Camp E-MA-CHAMEE.

18. Family Conference Report dated January 31, 1975, prepared by Nancy Cupit, Camp E-MA-CHAMEE.

19. Progress Review from Baker Correctional Institution dated April 13, 1982.

20. Progress Review from Baker Correctional Institution dated October 25, 1982.

21. Progress Review from Baker Correctional Institution dated April 29, 1983.

22. Presumptive Parole Release Date Commission Action dated June 2, 1982.

23. Classification and Admission Summary from the Department of Corrections dated November 30, 1984.

24. Psychological Screening Report from the Department of Corrections dated September 28, 1981, prepared by G.C. Omer, III.

25. Classification and Admissions Summary from the Department of Corrections dated September 24, 1981.

26. Uniform Commitment to the Custody of the Department of Corrections, Leon County Case No. 83-2939, dated August 27, 1984.

27. Photographs of Joe Elton Nixon.

28. Referral for Admission from Training School, dated August 1, 1972.

29. First Commitment Coversheet, dated February 23, 1972 until August 15, 1972.

30. Psychiatric Consultation Followup, dated August 10, 1972, prepared by Daniel A. Kaufman, M.D.

31. Second Commitment Coversheet, dated March 1, 1974 until March 5, 1974.

32. Predisposition Report prepared February 20, 1974, by Newkirk and Cummings.

33. Psychiatric Evaluation dated March 22, 1972, prepared by James F. Griswold, M.D.

34. Progress Review, dated September 30, 1973, prepared by Newkirk and Cummings.

35. Progress Report dated May 1, 1974, prepared by Sandra Walsh from the Seminole Group Treatment Home.

36. Memorandum dated February 27, 1974 to Richard Rachin, Chief, Bureau of Group Treatment, from Sue Cituk.

37. Letter dated March 5, 1974, from Lennox Williams to Mr. and Mrs. Nixon concerning transfer of Joe to Seminole Group Treatment Home.

38. Commitment to Division of Youth Services, Leon County Circuit Court, Juvenile Division, Case No. 75-496, dated November 7, 1975.

39. Predisposition Report dated December 4, 1975, prepared by Newkirk and Cummings.

40. Prefurlough Study dated October 19, 1976, prepared by Paul Entzminger and Newkirk.

41. Letter dated May 3, 1976 from Lennox Williams to Mr. and Mrs. Nixon.

42. Letter dated March 11, 1976 from William Cummings to Roy McKay.

43. Memorandum dated February 20, 1976, from Roy McKay to Lennox Williams.

44. Letter dated February 3, 1976 from William Cummings to Lennox Williams.

45. Letter dated February 20, 1976 from George M. Wood to Lennox Williams.

46. Furlough Agreement dated October 30, 1976.

47. Psychological Evaluation dated April 29, 1975 prepared by Tom Heiman.

48. Psychological Evaluation dated February 19, 1974 prepared by Apalachee Community Mental Health Services, specifically Wendy Miles and Elizabeth Stribling.

49. Third Commitment Coversheet dated December 8, 1975 to October 30, 1976.

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324-CF

STATE OF FLORIDA,

v.

JOE ELTON NIXON,

Defendant.

MOTION TO PROVIDE COPIES OF DEPOSITION TRANSCRIPTS

The Defendant moves this Court for its Order directing that the herein listed Court Reporter provide counsel for the State and counsel for the Defendant each with a copy of the transcript of testimony taken upon oral deposition of the following witnesses:

WITNESSES	COURT REPORTER	DATE
James Outland	Loretta Jackson	1/17/85
Doretha Mungen		
Doug Barrow		
Dennis Council		
Norma Clouser		
Sandra Brooks		
Wayne Connell		
Willie James Harris		
Gregory A. Cleary		
Ted Cox		
Jeff Attaberry		

Mary Attaberry		
Jim Turvaville		
Mary L. Todd		
Ann Council		
Trooper Glass	Loretta Jackson	1/18/85
Johnnie Lewis Tucker		
Judith Hill		
Evelyn Harris		
Henry Hunter, III		
Linda Gallagher		
Mary Louise Still		
David Bickner		
JoAnn Plachy		
James Edward Nixon	Lisa Eslinger	1/21/85
Deputy Sturmer		
Sgt. Ash		
Sgt. Daws		
Sgt. Gunter		
Deputy Koester		
Deputy Fox		
Dick Simpson		
Det. John Livings	Lisa Eslinger	1/22/85
Det. John Miller		
Deputy Carroll Hurdle		
Deputy Lee		
Capt. Brett		
Dr. James Patty		
Dr. Ben Turner		
Det. Paul Phillips		
Nayola Darby		
Karen Cooper		
Susan Cleary	Lisa Eslinger	1/23/85
Tim Coughlin		

Capt. Dale Wise
Major Larry Campbell

As grounds for this motion counsel for the Defendant would show as follows:

1. The Defendant is charged with the offenses of Murder in the First Degree, Kidnapping, Robbery and Arson in Case Number 84-2324-CF.

2. The Defendant has pled not guilty in this case, and it is set for trial by jury on March 26, 1985.

3. Plea negotiations will apparently not resolve the case and trial by jury is probable.

4. The Defendant is indigent and is unable to bear the costs of deposition transcripts. In accordance with the Constitutions of the State of Florida and of the United States of America, and pursuant to the Florida Rules of Criminal Procedure, the Defendant asserts that copies of the deposition transcripts are needed to insure that he receives due process of law, equal protection of the laws, a fair trial, effective assistance of counsel, and to adequately confront the witnesses against him at trial.

5. Copies of the deposition transcripts will be of significant assistance to both counsel for the Defendant and counsel for the State in preparing for trial.

6. James C. Hankinson, the Assistant State Attorney who is prosecuting this cause joins in this motion.

WHEREFORE, the Defendant prays that the Court will enter its Order providing counsel with copies of the transcribed testimony of the above-listed witnesses in this case, and tax the costs against Leon County, Florida.

Respectfully submitted,

MICHAEL M. CORIN
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324-CF

STATE OF FLORIDA,

v.

JOE ELTON NIXON,

Defendant.

MOTION TO PROVIDE COPIES OF DEPOSITION TRANSCRIPTS

The defendant moves this Court for its order directing that the herein listed Court Reporter provide counsel for the State and counsel for the defendant each with a copy of the transcript of testimony taken upon oral deposition of the following witnesses:

WITNESSES	COURT REPORTER	DATE
Wanda Jones Tom Igles Wanda Robinson Tony Revell Barbara Field John D. Nixon	Barbara Brobst for all depositions	2/14/85

As grounds for this motion counsel for the defendant would show as follows:

1. The defendant is charged with the offense of Murder, Kidnapping, Robbery and Arson.

2. The defendant has pled not guilty and the case is set for trial by jury on March 26, 1985.

3. Plea negotiations will apparently not resolve the case and trial by jury is probable.

4. The defendant is indigent and is unable to bear the costs of deposition transcripts. In accordance with the Constitutions of the State of Florida and of the United States of America, and pursuant to Florida Rules of Criminal Procedure, the defendant asserts that copies of the deposition transcripts are needed to insure that he receives due process of law, equal protection of the laws, a fair trial, effective assistance of counsel, and to adequately confront the witnesses against him at trial.

5. Copies of the deposition transcripts will be of significant assistance to both counsel for the defendant and counsel for the State in preparing for trial.

WHEREFORE, the defendant prays that the Court will enter its order providing counsel with copies of the transcribed testimony of the above-listed witnesses in this case, and tax the costs against Leon County, Florida.

Respectfully submitted,

MICHAEL M. CORIN
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

(Certificate of Service omitted in printing)

EXECUTIVE DIRECTOR
JACK MAY, PH.D.

CLINICAL DIRECTOR
JAMES M. MENDELSON, PH.D

TALLAHASSEE
PAIN AND STRESS MANAGEMENT
INSTITUTE
1126 LEE AVENUE
TALLAHASSEE, FLORIDA
PHONE NUMBER (904) 222-5116

MEDICAL DIRECTOR
J. DAVID MOORE, M.D.

June 4, 1985

Mike Corin, Esquire
Assistant Public Defender
Second Judicial Circuit of Florida
Barnett Bank Building
P.O. Box 671
Tallahassee, FL 32302

RE: Joe Elton Nixon

Dear Mr. Corin:

As per your request, I have completed a psychological evaluation of your client, Joe Elton Nixon.

BACKGROUND: Mr. Nixon is a 23 year old single black male with 10 years of education. He is incarcerated at Leon County Jail on charges of first degree murder, kidnapping, robbery and arson. A lengthy Juvenile and Adult arrest record preceded the above charges: 7 Juvenile arrests including shoplifting, arson, burglary, breaking and entering and possession of stolen property; adult arrests for armed robbery, auto theft, dealing stolen property and shoplifting.

Elements of the social history include: Both parents alive and in good health, the client is the fourth born in a sibline of five males and three females. He attended Godby High School in Tallahassee up to the 10th grade. Avocational interests include amateur boxing. Mr. Nixon uses alcohol, cocaine and marijuana.

According to the client, medical history is essentially negative except for vague somatic complaints. He has had no major hospitalizations or surgeries. While incarcerated in 1982 he was struck in the head with a lead pipe and lost consciousness for a brief period of time. He was vague in regard to details surrounding this incident.

When asked to describe himself as a youngster he quipped, "I was a little gangster ... stayed in trouble ... I liked to take things." Growing up he felt closest to his brother John even though, "He got me into fights and stuff ... he had me fighting his battles." Joe had a difficult relationship with his father whom he described thusly, "He'd whip us when we did something wrong ... set down the rules ... made us go to church." Joe feels that his mother neglected him, "Didn't look after me as well as she did the rest of em ... always telling Daddy and getting me into trouble."

Mr. Nixon described a history of problematic relationships with the opposite sex. His first "girlfriend" was attracted to him based on his ability to steal things for her. Several subsequent relationships paralleled the first. His latest relationship with Wanda Robinson took a different dimension for Joe – he describes her in glowing terms and remains infatuated with her despite the fact that she apparently dropped Joe for his brother John. Difficult relationships with females (from mother on) appears to be a theme in Mr. Nixon's life.

PERTINENT INFORMATION REGARDING THIS CLIENT

According to the client, the days prior to the crime were marked by emotional turmoil, heavy alcohol use and the disintegration of his relationship with Wanda. Joe was aware enough of his chaotic frame of mind that on Thursday he called the police and asked them "to take me to jail." Wanda and Joe were constantly fighting, as she tried against Joe's will, to pull out of the relationship. On Friday evening they had a physical altercation in "Frenchtown" which required police intervention. As the weekend progressed Joe got less and less sleep and drank progressively more. Early Saturday morning he knew John and Wanda were together, "I was mad with the whole world ... I just didn't care." He went to Governors Square Mall.

> "I went to the Mall to walk around ... I pulled this lady ... I knew her ... from Sid's Lounge ... I told her go for a ride ... we rode off to the place where you get License ... I asked her for money ... she said I have to wait ... I banged her up and put her in the trunk. I drove by where Wanda was staying. I let her out of the trunk ... I said no money ... I don't need money ... I said I going to kill you."

Mr. Nixon then proceeded to tie up (with jumper cables), choke to death and attempt to burn Jeanette Bickner. He was arrested several days later at the apartment of Wanda Robinson.

BEHAVIORAL OBSERVATIONS

During formal examination Mr. Nixon was alert, oriented and cooperative. He appeared somewhat anxious and giggled inappropriately, especially during the first session. He is of average height and muscular build, no obvious physical defects were noted. His speech was articulate, though spontaneous, and direct. No bizarre or delusional material surfaced during the examination.

TEST ADMINISTERED

Weschler Adult Intelligence Scale (Revised), Seashore Rhythm Test, Speech Sounds Perception Test, Weschler Memory Scale (Russell Adaptation), Category Test, Cognitive Mental Status Exam, Bender Gestalt Test, Tactual Performance Test, Trail Making Test, Finger Oscillation Test, Small Pegs, Sensory Perceptual Exam, Minnesota Multiphasic Inventory, Rorschach Examination and the Early Recollection Projection Technique.

RESULTS

Note: Psychological Tests/Techniques employed in this evaluation are all of an acceptable validity and reliability (except as noted otherwise). However, using testing material for postdicting/predicting behavior is a matter of probability. (In other words, most of the statements made in the body of the report could be suffixed with "this is true 19 times out of 20").

COGNITIVE FUNCTIONING/NEUROPSYCHOLOGICAL STUDIES

Orientation: During all testing sessions, Mr. Nixon was entirely oriented and cooperative.

Intelligence: According to the WAIS-r, the client achieved a full scale IQ in the "Borderline range (Full Scale = 73, Verbal IQ = 74, Performance IQ = 72). There were considerable interest scatter in that on a measure of visual attention he performed in the low-average range whereas on a measure of verbal reasoning and comprehension, he was in the severely impaired range.

Memory: The first stage of memory processing is viewed as being able to pay attention. The Seashore Rhythm Test, a measure of auditory attention, revealed six errors which is in the marginal range. Similarly on Speech Sounds Perception again a measure of auditory attention he made nine errors, once again in

the marginal range. Memory functioning, as measured by the Weschler Memory Scale was clearly impaired on verbal immediate and delayed memory measures. Marginal scores were obtained on figural (nonverbal) indecises of memory functioning.

Reasoning: Mr. Nixon made 101 errors on the Category Test of the Halstead Reitan Battery, which is a measure of nonverbal reasoning. On this test he perseverated using ineffective strategies despite feedback that he was wrong. The cutoff for brain impaired functioning on this test is 50 or more errors.

Language: Overall language functioning seems to be an area of strength for Mr. Nixon in that on a brief language exam he made only one error of a pronunciation type.

Spatial: Mr. Nixon did not display constructional dyspraxia. His scores on the Tactual Performance Test using his dominant, nondominant and both hands were in the marginal range. During the memory and localization component of this task he could remember eight of the forms but placed none of them in their proper spatial relationship to one another. Such performance indicates some problem with the intermodality transfer of information.

Motor: On Trails A, a simple motor sequencing task he performed at the 30th percentile as compared to age peers. On Trails B, a more complex motor task involving sequencing and the simultaneous maintenance of two chains of operation he performed at the 14th percentile. Finger Oscillation was somewhat slower in his nondominant left hand than we normally expect (right = 50, left = 42).

Sensory: On a Sensory Perceptual Exam, he made no errors.

A summation of the above neuropsychological studies using the Halstead Reitan Impairment Index would index clear organic impairments. The Halstead Reitan Index equaled 1.0 (.5 or

above is considered brain impaired). Lateralizing and localizing signs were not robust. There were no signs of a progressive lesion.

These findings could be the result of several factors: genetic influences, prenatal influences, perinatal complications, numerous microscopic changes secondary to his boxing and mild close head injury after being struck in the head with a lead pipe.

The clinical implications of these findings are as follows: Joe Nixon is likely to experience some difficulty in problem solving in novel situations. His capacity with dealing actively, assertively and constructively with environmental changes is limited. His ability to comprehend, adjust to and deal effectively with new situations is probably compromised.

Personality Assessment: In unstructured, ambiguous situations (Rorschach Examination) Mr. Nixon demonstrated the capacity for adequate reality contact. He is able to see the world as it is not necessarily distorted by his own internal processes. However, when affective (emotional) stimulation is added his perceptual accuracy falls to the marginal range. In other words, in situations that are highly emotionally charged, his ability to accurately perceive what is going on declines significantly. In the balance between being internally stimulated and motivated versus being externally stimulated and motivated he demonstrated the capacity for an adequate influence from both spheres. In the interpersonal realm the faulty assessment of social realities and inaccurate analysis of interpersonal interactions was noted in that many of his human movement responses were spoiled. A weary, cautious anxiety ridden interest in human beings is manifested in his lack of whole human percepts. Loneliness, helplessness, and a painful alertness to expected danger is suggested in an analysis of determinates.

At no time during interview or testing did Mr. Nixon indicate that he was guided by "voices", or in any way responding to visual or auditory hallucinations. Some elements of magical thinking was noted in that he was concerned about Wanda working "roots" on him.

The MMPI configuration he endorsed was not overly defensive though there was some question as to validity. However, the clearest scale elevation on the MMPI has many items which overlap with the validity scale. In such situations the profile can be interpreted with caution. With that in mind, this profile is seen in individuals that manifest depression, emotional inappropriateness over ideation and fears or phobias are often present. These people spend much time in day dreams, are shy and anxious and keep others at a distance. They show difficulty in concentrating and their thinking is often autistic. The content of these patient's thoughts is almost always unusual and unconventional. Suspicion, distrust and grandiocity [sic] are often typical. Behaviorally, these patients are often unpredictable. These individuals are usually single. Most have inner conflicts about sexuality.

Thematic analysis of his early recollections indicated the following themes: 1. Revenge 2. Revenge 3. Revenge 4. Feeling rejected at home 5. Being afraid to leave the support and nurturance of a female.

On the Three Wishes projective technique which was administered immediately after discussing Jeanne Bickner, Mr. Nixon asked for (1) "Freedom" (2) "To be a boxer" and (3) "A son". At no point during the lengthy evaluation did he express remorse.

DISCUSSION/SUMMARY: The above psychological studies delineated as 23 year old black male who is currently functioning in the borderline range of intellectual abilities. Projective studies showed the capacity for poor reality testing when in emotionally

laden situations. The faulty perception of interpersonal relationships was manifest. Dealing with the complexities of interpersonal relationships is beyond Mr. Nixon, he is hampered by his borderline intellectual ability as well as some moderate degree of brain impairment. Impulse control is likely to be poor. Thematic analysis suggests that his primary mode of dealing with conflict is to immediately shift to a revenge mode and thoughts of retribution. His years of incarceration as a child and adolescence hampered normal maturation.

The situation with his brother John and lover Wanda was difficult for Joe to comprehend and organize. He was angry with Wanda, angry with John and wanted revenge. He was in love with Wanda, John was his brother. Limited intellect, poor reasoning (quite possibly secondary to brain impairment), lack of sleep, the effects of alcohol, emotional turmoil all acted to weaken Joe Elton Nixon's capacity for reason. It is possible that Jeanne Bickner was the focus of Joe's misdirected rage. Rather than venting his rage on John and Wanda, he focused it on Jeanne Bickner.

DIAGNOSTIC IMPRESSION

1. Borderline Intellectual Abilities
2. Mild diffuse cortical impairment.
3. Mixed personality disorder with elements of antisocial, borderline and narcissistic personalities.

Respectfully submitted,

Alan L. Doerman, Psy.D.
Associate

ALD/jrg

M.L. EKWALL, M.D., P.A.
1889-20 PROFESSIONAL PARK CIRCLE
TALLAHASSEE, FLORIDA 32308

NEUROPSYCHIATRY
ELECTROENCEPHALOGRAPHY

PHONE (904) 877-5064
BY APPOINTMENT ONLY

June 17, 1985

Michael M. Corin
Assistant Public Defender
Barnett Bank Building
P.O. Box 671
Tallahassee, FL 32302

Re: Joe Elton Nixon
a/k/a: Job Elton Nixon
a/k/a: "Jo-Jo" Elton Nixon
DOB: 08-23-61

Dear Mr. Corin:

In accordance with the Order of J. Lewis Hall, Jr. appointing me as a Defense Expert to examine the above named defendant in order to assist counsel for the defendant for the preparation of his defense, Mr. Nixon was examined in my office on March 28, 1985 and on April 11, 1985. A social history, psychiatric evaluation, mental status examination, Minnesota Multiphasic Personality Inventory, Sachs Sentence Completion Test, Electroencephalogram and a neurological examination were performed.

In addition the rather extensive reports of his juvenile behavior, his multiple stays at the Arthur G. Dozier School for Boys and his incarceration in the Florida State Prison as well as his periods of stay at the various boys camps and the Jack Eckerd camp were reviewed. As you are well aware this boy seemed to be perpetually in trouble while away from a structured environment. However, it should be noted that although he was "an angel in

the institutional setting"all evaluations, even from the age of 10, have caution [sic] that his disruptive behavior in the community would portend a bleak outlook and a poor prognosis for ever becoming a useful and productive citizen. The most recent antisocial events of August 11-12, 1984 certainly bear out that ominous prediction.

Because of the relatively good health that he has maintained throughout his lifetime the episode of being knocked unconscious in 1983 when struck with an iron pipe while incarcerated in Florida State Prison seemed important to evaluate and was the reason for the neurological and electroencephalographic examination.

On general physical examination he was found to 7'7 ½ " [sic] tall and weighed 164 lbs. Body type was of athletic build and muscular with spotty white patches appearing over portions of the body. No significant scars were noted although he reported three sutures taken in the right cheek area at the time he was rendered unconscious by the iron pipe. The cranial nerves were examined serially and found to be intact. The tonsils were moderately enlarged but not injected [sic]. Deep tendon reflexes were active and equal bilaterally and superficial reflexes were likewise active and equal bilaterally. No pathological reflexes were elicited. Coordination tests were well performed and sensory modalities were intact. In general the neurological examination was essentially within normal limits and showed no evidence of focal or disseminated neurological disease.

The electroencephalographic tracing was found to be well within limits of normal variations for this age group and no electrical evidence of focal cortical lesion, expanding lesion, or epileptiform activity were noted. Since history indicates that there has been no significant change in his physical abilities nor in his intellectual abilities and antisocial behavior it is my opinion that the iron pipe incident will not be found to have significant influence on the present situation.

As a younger boy, and prior to his present incarceration, it was frequently noted that drugs and alcohol were not significant factors. However, it is my information from the patient that in recent months he has used marijuana frequently, as well as free base cocaine and that alcohol has been used daily and frequently to excess and was very much a part of his state of mind in August of 1984. He tells me that using marijuana "give me a high – like I'm happy or in a dream world – out in the wilderness and alone in a cabin – like a wild horse." He further adds that when using marijuana "if I am in a crowd I try to talk to the most attractive girl in the crowd". When using alcohol, which he began at age 16, "I get in a few fights but I am the best dancer on the floor and if I drink wine or brandy I really have a good time". He has found that if he has a problem, and with nobody to talk to "I'd head for the liquor store and just sit by myself and drink and talk by myself". Tobacco usage has been limited to about 1 pack daily.

Mr. Nixon gave me a rather extensive description of his drug and alcohol intake and behavior on the 48 hours prior to the murder and up to the time of his arrest. I shall not detail this description in the letter but will go over this with you prior to the trial to see if there are any discrepancies with your information with the thought this information will provide some mitigation since it appears that Jeanne Bickner was not the primary target of his rage and revenge feelings he was experiencing at that time.

Because of the probability of a neuropsychological problem in this case I had Mr. Nixon examined by Dr. Allen L. Doerman. PsyD. and his report is in your hands. It is my opinion that his evaluation provides the frame work for describing the turmoil and rage Mr. Nixon was feeling at that time.

As a result of my examination it is my opinion that Mr. Nixon is sufficiently free of mental defect disease or derangement that he would be found competent to stand trial and be held responsible for his actions. He is technically capable of cooperating with his

attorney but because of his lifelong history of lying and creating fantasy situations and blaming others for his troubles it will be extremely difficult to get his full cooperation.

I think it would be helpful in the further progress of this case if you and I could plan to get together for an hour of face-to-face discussion regarding the multiple ramifications of this case.

Sincerely,

M.L. Ekwall, J.D.

MLE/ln

[Volume XI, Record on Appeal, Case No. 67,583]

[1851] MR. CORIN: Thank you, Your Honor.

Morning, ladies and gentlemen. I will stand back a little bit so I can make sure counsel and the Court and jurors can hear me.

[1852] In this case, there will be no question that Jeannie Bickner died a horrible, horrible death. Surely she did and that will be shown to you. In fact, that horrible tragedy will be proved to your satisfaction beyond any reasonable doubt.

In this case, there won't be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie Bickner's death. Likewise, that fact will be proved to your satisfaction beyond any reasonable doubt.

This case is about the death of Joe Elton Nixon and whether it should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement.

Now, you are going to sit as jurors performing the highest, the absolutely highest function of your lives in our society. There is no greater duty than to assist Judge Hall in resolving a life and death dispute between a citizen accused and his government. There is nothing more important in life than what you are about to do.

Now, you have taken an oath to decide this case as best you can, as best you can. All the yack yack over there over the last three days was geared towards Mr. Hankinson and Mr. Guarisco and myself trying to ascertain whether you would give each of us a fair trial, [1853] have an open mind. All we can ever ask is that you do the best you can and that you do the best you can at a proper time. As the Judge has told you, you don't

make up your mind, you don't discuss the case among yourselves or with anyone until the proper time. He will tell you that in his instructions.

Now, in arriving at your verdict, in your penalty recommendation, for we will get that far. you are going to learn many facts about this case, many facts about Joe Elton Nixon. Some of those facts are going to be good. That may not seem clear to you at this time. But, and sadly, most of the things you learn of Joe Elton Nixon are not going to be good. But, I'm suggesting to you that when you have seen all the testimony, heard all the testimony and the evidence that has been shown, there are going to be reasons why you should recommend that his life be spared.

Thank you.

[Volume IV, Record on Appeal, Case No. 67,583]

[641] MR. CORIN: Ladies and gentlemen of the jury, I wish I could stand before you and argue that what happened wasn't caused by Mr. Nixon, but we all know better. For several very obvious and apparent reasons, you have been and will continue to be involved in a very uniquely tragic case.

In just a little while Judge Hall will give you some verdict forms that have been prepared. He'll give you some instructions on how to deliberate this case. After you've gotten those forms and you've elected your foreperson and you've done what you must do, you will sign those forms. I know you are not going to take this duty lightly, and I know what you will decide will be unanimous.

I think that what you will decide is that the State of Florida, Mr. Hankinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged; first-degree premeditated murder, kidnapping, robbery, and arson.

Once you have arrived at those verdicts, [642] there will by that decision be caused a second part of this trial. That's something that we had discussed with you earlier prior to taking your oaths as jurors.

At that time, you indicated that regardless of your own personal beliefs in the death penalty, you would listen to the evidence. You would listen to the Judge's instructions. You would weigh that evidence in arriving at an advisory recommendation of [sic] Judge Hall.

After today is over, we start the second part of this trial. The evidence and testimony that you've seen and heard will also

become part of your evidence that the State may introduce or I may introduce in Mr. Nixon's behalf.

After you have heard all that evidence, the testimony, Mr. Hankinson or Mr. Guarisco and myself will be able to present additional arguments to you, and Judge Hall will give you instructions to guide your deliberations.

It will be at that point as difficult as it may seem at this point. I will hope to be able to argue to you and give you reasons not that Mr. Nixon's life be spared one final and terminal [643] confinement forever, but that he not be sentenced to die. Thank you.

THE COURT: Mr. Hankinson for the prosecution.

MR. HANKINSON: Before I start into what I want to tell you about the case, I first want to thank you for being willing to come and sit on this case.

You know, jury duty is always a burden on people. It's especially a burden when we ask you to go and stay in a motel and stay away from your family and friends and so forth for a period of time. I appreciate the fact that you are willing to do that.

I appreciate that especially because – you know, I know it's hard for you to sit here and sort out what [sic] huffing and flattery by lawyers and what's sincere and from the heart, but I can tell you sincerely that I look at this group. I can be proud that we have 13 conscientious and intelligent people like you that were willing to take on this duty.

We all know that during jury selection at any point in time, really, you could have said something that could have gotten you off the jury. [644] We all realize that. So, it really

was on your part a conscious decision that you are going to accept your duty and sit on this jury.

I appreciate that. The State of Florida appreciates that. I know that you will conscientiously consider this case. I know that you are an intelligent group that will understand the facts, and I hope that you are the kind of group – and I do believe that you are - that has the mental toughness to do what's going to be called upon you to do.

I think that's really what it comes down to. I know that it is not pleasant to sit here and listen to the kind of testimony that you had to listen to. I know that we would prefer not to have to have these kinds of cases. We would prefer not to have to think about such things, but it is important.

We have to realize that there are people in this world like this Defendant that have to be dealt with, and we have to have a jury willing to sit here and listen to those facts and deal with it.

I noticed sometimes people wonder about and I [645] guess have different ideas on what makes a prosecutor tick. You probably wonder: Well, do Mr. Guarisco and I enjoy the fact that we're presenting this horrid thing to you. I assure you we don't.

Yet, at the same time, we have an obligation to make you feel just a little bit, just a little bit, of what Jeanne Bickner felt because, otherwise, sometimes I think it's easy to forget that. And the emotions involved in this case - and they are there. There are emotions going both ways in this case.

Hopefully, those emotions on the one hand where you are talking about imposing, well, the most serious penalties we have against a person which is an emotional thing are counterbalanced by the emotions of the terrible thing that's happened in this case. And then as a group of 12 people you can set this aside, set that

aside and you make an objective decision. You follow the law that the Judge gives you because that's what we need you to do.

As I come down to this part of the case, you know we're worried. Mr. Guarisco and I – we talked about well, what's the jury thinking. You [646] are a very poker-faced group. You don't let us know much about what we're [sic] thinking. Have we done something to offend someone? Have we done something to turn somebody off? Have we done something to confuse somebody or anything that we have done to interfere with your deliberations in the case? We do worry about that.

We try to think what are you thinking. Some of you may be sitting there thinking: Well, Mr. Corin just got up and said, well, you are going to have to go back into the jury room and find him guilty. Why doesn't the State just sit there and say: Fine, and let's go on and go back and do that.

That is a thought that crossed my mind. But you have to understand that we've lived with this case a long time. It isn't quite as simple enough for us to say well, we assume that the jury is going to do what Mr. Corin just said. So, we don't have to say anything. I hope you can accept I can't do that.

You have to think about why does Mr. Corin get up and make that kind of comment to you. What are the tactics that he's thinking of? The second thing is I want to make sure you are not confused [647] by this.

My wife was here during opening statements. Sometimes it helps to have some nonlegal person listening, and it kind of gives you a difference prospective. When I came home, she says: Well, I heard the opening statements. Why are you still having a trial based on what was said in opening statements by the Defense attorney?

I better address that because if it's something that confused her, maybe it's something that confused or worried you. You have to accept what the Judge has told you, what we've talked about that what a lawyer says is not evidence, nor does what a lawyer says in opening or closing argument have any legal affect at all. It's argument.

Obviously, it probably puts you in a somewhat different state of mind, but it does not relieve the State of Florida of its burden of proving its case to you and proving it to the Court, to the Court's legal satisfaction. So, we still have that burden.

Even aside from that, we're asking you as jurors to impose an ultimate penalty. I think that you are entitled and need to know all the facts of [648] that case before you are asked to do that so that you can understand what's going on.

And last, this testimony that's been presented to you and this argument that I'm going to make to you probably would have to be presented to you anyway in the penalty phase of this proceeding because most of the things that we're going to argue to you in the penalty phase – I'm not going to get to make that argument. So, this is really my last time I'm going to get a chance to talk to you – Mr. Guarisco is going to talk to you – are things that have already been proven to you. Aggravating circumstances that the judge is going to tell you about. There will probably be very little further testimony presented by the State.

So, this is the testimony that relates to the guilt and innocence phase, but is also relates to the aggravating circumstances that are going to be presented to you, explained to you by the Judge and going to be argued to you.

And last in those terms is I don't think a case can be over proven. Our burden is high. Probably, all we had to do in this case was put that tape in the Monday and play it for you. It [649]

probably would have been sufficient in this case, but we don't deal about probabilities.

We presented all the evidence to you, and I don't think we have to deal with probabilities any further. You've heard the facts. We want when you go back into that jury room, there to be no question in your mind. No question whatsoever that you have the Defendant in this case. This is a person that committed these crimes and that he should accept the punishment for it.

And the other reason that I believe that you need to think about the strategy of Mr. Corin is that I believe probably he's going trying to develop credibility with this jury so that when it comes down to the penalty phase, you would sit there and say: Well, in opening statement, Mr. Corin said that there will be no question that Jeanne Bickner died a horrible, horrible death. Surely, she did. That is what he said in opening statement which is certainly a true statement.

He went on the say in this case there will be no doubt, none whatsoever, that my client caused Jeanne Bickner's death. I think that he hopes that by going ahead and bringing out these things and tell you that these things are true that you are [650] going to accept necessarily when he comes in to the penalty phase and argues to you that you are necessarily going to accept what he argues to you.

I ask you not to necessarily fall in to that analysis. I want you to very carefully when we get to that point think about it. And again, if because of those tactics you've decided that you like Mr. Corin, remember, this isn't a contest of lawyers. It's a test of facts that are presented to you by the State.

You have to decide whether the facts have been presented to you, the legal standard been given to you by the Judge – whether those have been proven.

Let me talk about the law of this case a little bit. I'm not going nothing [sic] to great detail. Just a couple of things. First, in capital case such as this, a first-degree murder case such as this, the jury is given a copy of written instructions. The Judge is going to read them to you, and then he's going to give you a copy of them.

That scares lawyers sometimes. It scares us that somebody is going to take the instructions into the jury room and find an obscure phrase [651] somewhere in those instructions and attach great significance to it.

Now, these are the instructions that are going to be given to you, the written instructions that are to be provided by the Judge. I would ask you not to allow someone to become a legal scholar in the jury room to find some phrase buried somewhere to find that it has some tremendous significance.

Probably if it was not argued to you by the lawyers as having particular significance, it's probably because it didn't have a great deal of significance. But you will have a copy of the written instructions. If when the Judge reads them to you, if you can't follow them, you will have them.

But basically by and large when you boil it all down, the jury instructions presented to you tell you to use your common sense in arriving at a decision; that these are the elements that the State has to prove and you have to make your decision on.

Now, there is one thing in the instructions which I know is going to confuse you. It's called lesser-included offenses. We've been talking about [652] the first-degree murder. That's all we've talked about. We've been talking about kidnapping, robbery and arson.

Now, when you get the verdict form which the Judge will give you a written verdict form – they are written out – you are

going to find out that all of a sudden, there are a whole bunch of choices you have to make, a whole bunch of different alternatives. That's always confusing to a jury. I think probably one of the things that most confuses a jury.

These lesser offenses that we're talking about is simply building blacks [sic] of your most serious crime. In every case, the jury has to be instructed on the lesser-included offenses. That doesn't mean that there's any reason that you have to its [sic] consider them particularly or that that is a correct choice, but they are lesser-included offenses. They are the building blocks.

In other words, with the murder case, if you go backwards on your verdict form, the last instruction you read about would be manslaughter. The next most serious one is third-degree murder. Above that is second-degree murder. Above that is first-degree murder.

[653] Now, these are a part of the more serious charge, but the Judge is going to tell you that you should find the Defendant guilty of that crime, the highest crime, proven to you beyond a reasonable doubt.

And basically what this is is a chance for you to tell us what your theory on the case is and how the case was proven. There are two ways to prove first-degree murder. One is by proof of premeditation. That is, as the Judge will explain to you, a killing after a conscious decision to do that.

In this case, that premeditation has been shown to you in so many ways. The time involved in the case, taking Ms. Bickner and sticking her in the trunk, carrying her eight to ten miles, beating [654] her, tying her up, choking her, the method of death, the period of time involved in setting the fire, the fact that she begged him not to kill her. A conscious decision by the

Defendant in his statement that you heard today that he was going to kill her because she was a witness against him.

All of these are things, facts that you should consider in deciding that this Defendant did commit a premeditated first-degree murder, but there is another theory by which the case can be proven.

The second theory is that this murder was done during the course of certain enumerated felonies, which would be in this case, robbery and kidnapping. On that second choice, it does not require any proof of premeditation. Simply that the Defendant caused the death of Ms. Bickner and that it was during the course of a robbery or a kidnapping.

Now, I would submit to you that the proof in the case proves it both ways. One, that it has premeditated, that it was a premeditated murder. And two, that it was committed during the course of a felony of robbery or kidnapping.

If that is your decision as a juror, you [655] should check off on this special verdict form that we find that guilt was established by proof of premeditation and felony murder. If you find that it was only established by proof of premeditation, you should so indicate on this form or if you find that it was not proven that it was a premeditated death, but it was proven by proof of felony murder, you should prove it that way.

That would be what we call a special verdict. Basically, you are telling the Court what the theory is on your finding of first degree murder. This is for certain legal reasons down the road. I would ask you if you are convinced that it was premeditated and also during the course of commission, that you so state in your special verdict.

The other count I'll just talk about briefly is kidnapping, the second crime. Sometimes we think of kidnapping about what

we hear on TV where somebody is held for ransom. That's not the only way in the State of Florida by which a kidnapping is proven.

The three elements that must be proven to prove a kidnapping are that the Defendant forcibly, secretly or by threat confined or abducted Jeanne [656] Bickner; that it was against her will and that it was done to facilitate the offense of robbery or arson in this case.

There are two versions that you've heard about how the Defendant accomplished his kidnapping. One was the version that you heard in the tape that he gave to Major Camptell [sic] today was that after he had gotten out on Tram Road. At that point in time, he struck Ms. Bickner, took the wheel, put her in the trunk and then carried her out to the wooded area where he accomplished the murder.

The other version was when what he had told John Nixon and Wanda Robinson on the Monday prior to his arrest; that he had attacked her there at the mall, thrown her in the car at that time and then carried her out to the wooded area where the murder was completed.

I would submit that [sic] you that shouldn't cause you any problems; that either of those versions would fall under the kidnapping instruction that the Court would give you.

The third count, robbery, is simply a forceful taking, in this instance of the car, jewelry or money. I think the testimony you've [657] heard has been tremendous as to the robbery and I think all of us basically are aware of what robbery is.

The fourth is arson which in this instance is simply an allegation that the Defendant willfully damaged Ms. Bickner's car. I submit to you that the evidence is crystal clear that this, in fact, happened.

Now, I want to talk a little bit about the facts. I think this is important that we have clear in our mind what happened as much as we can. There are probably certain parts of it that we'll never know, but I think by and large we know exactly what happened.

The first way I'd like to do it is just to tell you a summary or a hypothesis of what the facts show happened. This would be in a more or less a chronology of what I submit the facts showed. Then go back and talk about how that's proven.

I submit to you that the story, if you want to call it a story, started on the morning of August 12, 1984, when Ms. Bickner rose and attended church, sang in the choir, made plans with her friends to go to the mall.

[658] She went to Morrison's with her friends. Afterwards, normal type activity, she decided to go shopping. After completing her shopping, I believe the evidence will show that somewhere around three o'clock, she left the mall. She walked out of Sears, the garden center and walked to her car.

At that point in time, a person unknown to her approached her and asked her to help jump off his car. Being the kind of person she was, she agreed to do that. She gave the jumper cables to this person, drove around to the end of the mall for the purposes of giving him a boost off to get his car started.

At that point, she was forced into the car either by actual force or by threats, driven to an area behind the Neal Kirkman Building, struck and stuffed in the trunk of her car. From that point, she was taken out to a wooded area, tied to a tree and beaten again.

At that point, she had conversation with this person in which she asked him to have mercy on her, not to kill her. She talked about being a Christian person and that if he would let her

go, she wouldn't report it. She would sign over the [659] title of the car.

The bag was placed over her head, the cloth bag. She was choked, tied to a tree with the jumper cables. That after being choked, a tunnel cover or canvas type roof from the car was thrown over her and she was burned alive. That's the end of Jeanne Bickner's story.

The Defendant's story goes on. The Defendant, Mr. Nixon, after killing Ms. Bickner, goes over to Pasco Street to show off his new car. He goes to Havana, riding around, having a big time. He shows off his car to his uncle, to his friend.

He shows off some rings. He told his uncle he was going to give them to his white girlfriend who he was going to marry. He returns to the mall and gets his Uncle Tom Igles' car and returns that to him.

On Monday morning he again returns to 910 Millard Street where he meets with Wanda Robinson and John Nixon. He's bragging, bragging about what he's done, trying to scare them, trying to be a big shot. He shows off his car and his rings and leaves. During the day, he's seen numerous places as far as Woodville driving around the count [sic] showing off this car.

[660] During the course of the day, he tried to sell the car to Mr. Turvaville. He pawns the rings to Mr. Council. And on Monday night goes back and spends the night with Willie James Harris and Evelyn Harris at their home.

Tuesday morning, the murder hits the news. It's in the newspaper. At that point, he takes Ms. Bickner's car and as he stated in his statement, he tries to destroy the evidence by burning it to try to remove the hand prints that he had placed on that.

He's arrested by Major Campbell and gives a statement which you heard today. When you go in to do your deliberations, I want you to think about it, think back to the statement. Think back to whether in that statement – and remember, this is two days after this murder – whether you heard some sign of remorse in there, some feeling of sorrow for the terrible thing he's done or whether you were just hearing the bland, matter-of-fact statement from somebody who has no concern whatsoever for human life.

Hopefully, the end of Joe Nixon's story will be with you. The proof that has been presented to you is overwhelming. I think that's indicative [661] of Mr. Corin's statements to you, but I want to review it just real briefly with you.

First, I don't want to – I'm not going to go through what each witness said. You heard the testimony. I know you are paying attention and you will recall it. I want to group these and just real quickly talk about it.

First, we know what happened at the mall from the testimony of Jeff and Mary Attebury; that they saw this Defendant about 3:00 p.m. with Ms. Bickner, obviously, I think from the description that they gave you, asking for a boost off. You know from their testimony that certain parts of what the Defendant told in his taped statement were not untruthful [sic] because you know they didn't walk out to the car together.

You know that the Defendant came across the line of cars, approached Ms. Bickner as she was walking up to her car. So, you know there are certain things that he's been untruthful about.

Then let's talk about the car. All of the various people that saw him in that car – eight different people, Greg and Susan Cleary on the day of the murder going to the area of the murder in her car. Afterwards over on Orange Avenue going in [662]

the direction of where Willie James and Evelyn Harris lived. Willie James Harris rides in the car with him on Sunday night and again sees him on Monday.

His own uncle James Nixon who has known him since he was a young boy. Evelyn Harris, his friend; Ernest Kilpatrick who sees him on Monday in the company of John Nixon and Wanda Robinson, and then John Nixon and Wanda Robinson. All of these people except the Clearys are people who know this Defendant well.

And on either Sunday or Monday, all of them saw him in Ms. Bickner's car. And then you have the testimony of Mr. Turvaville today, of him trying to sell the car on Monday. I believe the testimony was he started out at $200 and went down to $100 and eventually he was going to sell it to him for $50. It turned out he couldn't sell it because he didn't have the title to the car.

Then you have the testimony as to the rings. You have the various people that saw these rings which were identified by David Bickner as being Jeanne Bickner's rings. Willie James Harris, James Nixon, John Nixon, Wanda Robinson, all of which saw these rings in the possession of the Defendant.

[663] And then you have the testimony and they are in evidence before you about him pawning them. You had the testimony of Mr. Council who indicated to you that he saw a driver's license; that the driver's license matched with the picture of the person and that the person sold him those rings was the Defendant in this case Joe Nixon.

Then to go with that, we've put into evidence the driver's license so you can see that in early August, a short period of time before this offense, he had gotten a new driver's license with his picture on it.

And then let's talk about the expert testimony presented to you. You have Doug Barrow's testimony from the FDLE lab, a fingerprint expert who Mr. Corin stipulated to his credentials, that found six palm prints of this Defendant on Ms. Bickner's car.

You have the testimony of Karen Cooper that she matched the thread [sic] from the Sing Store which is where Willie James Harris told you that Mr. Nixon had had the flat with the rim and the tire that was in the trunk of the car after it was burned and that it matched.

And then you have the testimony of James [664] Outland who testified before you today that the Defendant did, in fact, sign the pawn ticket that has been placed into evidence.

And then last – and there's probably a whole lot more that I'm not going to talk about. In your deliberations, you might want to the [sic] talk about – you have the confessions that this is [sic] Defendant made both to the civilians and police officers.

To the civilians – and you need to think about who they were, too. To both his uncles, he admitted it. To Tom Igles, he admitted that he murdered the lady. He said he was mad at himself. James Nixon, who he admitted it to, his uncle. To his friend, Evelyn Harris, to his girlfriend Wanda Robinson, to his own brother John Nixon.

To all of these people, he admitted that he had done this despicable thing. And then you have the police to Captain Wise and Major Campbell. I hope that you were impressed as you heard the testimony today and as you heard it on the tape.

You don't have to accept necessarily just the credibility of the officer. The professional way in which this Defendant was treated despite the fact that you have to know that Major Campbell was [665] seething inside but tried to treat this

Defendant in a professional way and ensure that he understood his constitutional rights, knew what he was doing, treated courteously and not threatened or promised anything. And then he made those statements and you heard it today.

So, will I think as I said earlier, probably if this was the only thing that was presented to you, it would be ample proof of this case. And we didn't even talk about all the other matters of proof.

There are – we have a unique opportunity as lawyers. We live with a case for a long time. We get to know it pretty well. There are certainly things we want to make sure that you understand. To have a transcript of this statement.

I just want to go back and I want to highlight a few things that this Defendant said and things that Major Campbell was talking to him about. I hope you remember how the statement began.

Major Campbell says, "I don't want to try to put words in your mouth. It's your story. You tell us it. I don't know of any way to be any fairer than that." And then he proceeded to tell [666] it.

He was asked what happened, "I don't know the last name or nothing like that. I just killed her. I took her life and kept her car and tried to burn it this morning." "Did you know the lady at all?" No.

Then he was told by Major Campbell the lady's name. Later in the statement, he was asked how he happened to be talking to her. He said, "I had hurt my arm or something. She offered, you know, to take me home."

Later on in the testimony, when they're talking about how it happened, he said, "Then we headed out there. Then I hit

her, hit her in the head a few times. I told her that I was going out to Tram Road." "Who was driving? She was driving?" No, I told you I had done hit her.

"When did you hit her?" "When we got on the truck route, I grabbed the steering wheel." "Yes." "Where did you hit her?" "In the head." "With what?" "My fist." "What did she do?" "She hollered." "Hollered?" "Yes."

"So, what did you do when she hollered?" "Cut the car off." "Did she – did she bleed or [667] anything?" "Yes." "Where?" "In the head." "Whereabouts? Like, did her nose bleed or did her ear bleed or did her eye bleed?" "It was just blood all over her face." "Blood all over her face?" "Yes."

"Did she say anything other than holler?" "She told me don't kill her. And then I made her get out and put her in the trunk." "You put her in the trunk?" "Yes." "When you put her in the trunk was she still talking? Was she conscious?" "She was talking and she was just telling don't kill her. Yeah, and she would give me money and all that right there. If I would go to a phone booth and let her call, she'll call somebody to bring me some money."

"Then I asked her – I said I'm going to leave you here and keep you car." "What did she say about that?" "She said, 'I don't believe you are going to do that.'" "I said why. She said, 'Because you know I've seen your face and I can tell people.' I said, 'You know, something, you are right.' I said, 'You must want to die, you know.' And then I took her out.

"She was already out the trunk standing up with a bag over her head." "With a bag over her [668] head." "Yeah."

And then when you think about was the Defendant contained of all his faculties when this was going on, they had discussions: "You were trying to get out of there." "Just getting

rid of all that evidence and stuff." "So, you burned it up with the matches?" "Yes, I did."

"And then what did you do?" "Well, I just kind of sat there and talked to her." "What did you talk about?" "I told her about my life. She told me about hers. She was a Christian and all that."

"What else did she say?" "She told me that she wanted me to just leave her here and she'll sign her title over in my name, just keep the car. She don't want nothing like this to happen." "What else did she say?" "She begged, you know, just begging me and all right there." "All right."

"And then I took one of those black things, them old black things out the fire once it got heated up." "She was tied to the tree?" "Uh-huh." "And I just throwed it on her." "Whereabouts?" "On her head."

When you are thinking about whether this Defendant deserves any mercy from this jury, I want [669] you to think about Major Campbell asked him, "Why did you kill her instead of leaving her out there, Joe?" And you might remember in the tape at that point, he laughed. The Defendant laughed.

"She knows me. She knows. She knew my name and everything. You know, I did all those things and beat on her like that." "Thought she was going to tell on you." "Yes, because I had – you know, nine out of ten times, they are going to tell anyway, you know, if you take their car and all that right there."

So, he killed her because she knew him and could say who he was.

As I said, this is the last chance I'm going to get to talk to you. I want to just end with a few comments. In opening

statements, Mr. Corin said that this case is about the death of Joe Elton Nixon. I disagree with that.

As the Judge has already told you, you are here to judge a set of facts, not a person. A set of facts presented by the State. And the facts are about the death of Jeanne Bickner. I ask you to remember those facts today and later in the week when you deliberate in this case.

If at any time during your deliberations, you [670] begin to waiver based on appeals to sympathy or to your emotions, I want you to think back. And I want you to think back about how much mercy this Defendant showed to Jeanne Bickner. I want you to think back to what she felt.

I want you to think back to her begging for mercy and what the Defendant told her about that. And then after you've balanced that out, set aside those emotional things from one side or the other, then I want you to think real carefully about the instructions of law that the Judge gives you and the facts that have been presented to you. And then I want you to do your job. Thank you.

THE COURT: Mr. Corin to close.

MR. CORIN: May counsel approach the Bench.

(WHEREUPON, A BENCH CONFERENCE WAS HELD AND THE FOLLOWING PROCEEDINGS HAD.)

MR. CORIN: Judge, at this time, I would make a motion and ask for a mistrial based on a comment made by Mr. Hankinson at the commencement of his statement to the jury concerning about we should all feel like Jeanne Bickner.

And that's what I would believe to be a prohibitive Golden Rule argument. I think at this [671] time to instruct to

[sic] jury to disregard it would be to no avail. I would move for a mistrial

THE COURT: I don't recall any argument to that.

MR. CORIN: As I recall, the argument was that we should all feel what Jeanne Bickner felt or something to that effect which I construed to be a prohibited Golden Rule argument.

THE COURT: I thought his statement was: We should all remember what she felt, not that we should all feel that way. I did not hear it as a Golden Rule argument.

THE COURT: If that's any question, maybe the Court Reporter can read back those notes.

(WHEREUPON, THE REQUESTED PORTION WAS READ BY THE REPORTER.)

MR. CORIN: We have a obligation to make you feel a little bit of what she felt.

THE COURT: I'll deny the objection and deny the motion for mistrial. I don't think that's a Golden Rule argument. I think its close, but I don't think that's a pure Golden Rule argument.

(END OF BENCH CONFERENCE.)

MR. CORIN: Ladies and gentlemen, I just have a couple of things I want to say in response [672] to Mr. Hankinson's argument. He said a lot of things about me and how I've handled this case. I don't know so much as to whether it's tactics or it's truth.

Now, Judge Hall has told you on more than one occasion that what we're about here is a deliberative search for truth. In searching for truth, there's two parts to a first-degree murder trial. It's not just one part; it's two parts.

Now, if the tactic is that I admit the truth, then so be it. In our deliberative search for truth, as the Judge has told you and probably will tell you again, we all live by certain laws and certain rules of evidence.

Those rules preclude the Defense from bringing out certain things at the first part of this type of trial. They don't likewise preclude the State from introducing matters that are proper for your consideration now and will be proper for your consideration after you are instructed by Judge Hall during the latter part of this week.

Now, he mentioned my credibility, whether you know, Mr. Corin would blow his credibility and maybe I suppose If Mr. Corin got up and made some kind of cockamamy argument that this horrible thing [673] didn't occur, he wouldn't be credible.

I don't care what you think of my credibility. As a defense lawyer, I get plenty of that from everybody. How can you do that which you do. My credibility here is not the issue here and never will be. Never will be.

I don't care what you think of me. I don't care what you think of Mr. Hankinson. I don't care what you think about anything except the law as you are going to be given it by the Judge and how you are going to decide this case.

Now, I haven't been emotional. I'm probably going to get that way. I may get that way pretty quick. But we're here about emotions and we're here about life, and we're here about reality, and we can't hide from these things. We all have basic

human feelings, and those can never be hidden. I can't hide mine and you can't hide yours.

I don't expect that to happen, but I'm not going to try to blast you into deciding something that based on emotion, based on pleas that Joe Nixon is a nice guy. You will never hear that from me, folks. You will never hear that from me.

I'm going to try to give you some reasons, some reasons, why you should recommend life. And [674] if I don't, then don't. Don't. Because that's going to be your job. I just want you to do the best you can. That's all I'm ever going to ask of you and that's all I can ask on behalf of my client. You do the best you can.

There's a proper time when you are going to do that, but it the [sic] takes time. Everything is not before you. I know I've harped on it. I've harped on it and I've harped on it. It's not over until it's over, and it's not near over yet.

Now, I feel like I want to say some things about Mr. Nixon's statement, but I'm not going to say those things. You are going to have the tape. Now, Mr. Hankinson read portions of the tape. The tape in its entirety is not an easy thing for you to have to hear.

It's cold, but, you know, it's cold on both sides. You ought to listen to it. It's cold on both sides, but there are certain things on that tape which I think would lead you to believe that there are certain things that make Joe Nixon maybe not quite the obvious ogre that he is, at least what you might believe today.

I want you to do your job the best you can. That's all I'm ever going to ask you [sic] of you. Thank [675] you.

* * * * *

[687] Now to these charges the Defendant has entered a plea of not guilty. This means that you must presume or believe the Defendant is innocent. The presumption stays with the Defendant as to each material allegation in the indictment through each stage of the trial until it's been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

To overcome the Defendant's presumption of innocence, the State has the burden of proving the following two elements beyond a reasonable doubt. First, the crime with which the Defendant is charged was committed. Second the Defendant is the person who committed the crime. The Defendant is not required the [sic] prove anything.

Whenever the words "reasonable doubt" are [688] used, you must consider the following. A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt.

On the other hand, if after carefully considering, comparing and weighing all the evidence, or if having a conviction, it's one which is not stable but one which wavers and vascillates, then the charge is not prove [sic] beyond a reasonable doubt and you must find the Defendant not guilty because the doubt is reasonable.

It [sic] to the evidence introduced upon this trial and to it alone that you are to look for a proof. A reasonable doubt as to the guilt of Defendant may arise from the evidence, conflict in the evidence or the lack of evidence. If you have a reasonable doubt, you should find the Defendant not guilty. If you have no reasonable doubt, you should find the Defendant guilty.

It's up to you to decide what evidence is reliable. You should use your common sense in deciding which is the best [689] evidence and which evidence should not be relied upon in considering your verdict. You may find some of the evidence not reliable or less reliable than other evidence.

You should consider how the witnesses acted as well as what they said. Some of the things you should consider are: Did the witness seem to have an opportunity to see and know the things about which the witness testified? Did the witness seem to have an accurate memory?

Was the witness honest and straightforward in answering the attorneys' questions? Did the witness have some interest in how the case should be decided? Does the witness' testimony agree with the other testimony and the other evidence in the case? You may rely upon your own conclusions about the witnesses.

A juror may believe or disbelieve all or any part of the evidence or testimony of any witness specified [sic] witnesses are like other witnesses with one exception. The law permits an expert witnesses [sic] to give his opinion. An expert's opinion, however, is only reliable when given on a subject about which you believe him to be an expert. Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

[690] A statement claimed to have been made by the Defendant outside of Court has been placed before you. Such a statement should always be considered with caution and weighed with great care to make certain it was freely and voluntarily made.

Therefore, you must determine from the evidence that the Defendant's alleged statement was knowingly and voluntarily and freely made. In making this determination, you should consider the total circumstances, including but not limited to:

One, whether when the Defendant made the statement, he had been threatened in order to get him to make it. Two, whether anyone had promised him anything in order to get him to make it. If you conclude the Defendant's out-of-Court statement was not freely and voluntarily made, you should disregard it.

Circumstantial evidence is legal evidence in a crime, and any fact to be proved may be proved by such evidence. A well-connected chain of circumstances is as conclusive in proving a crime or fact as is positive evidence. Its value is dependent upon its conclusive nature and tendencies.

Circumstantial evidence is governed by the [691] following rules: One, the circumstances themselves must be proved beyond a reasonable doubt. Two, the circumstances must be consistent with guilt and inconsistent with innocence. Third, the circumstances must be of such a conclusive nature and tendency that you are convinced beyond a reasonable doubt of the Defendant's guilt, the facts to be proved.

If the circumstances are susceptible of two reasonable constructions, one indicating guilt and the other innocence, you must accept that construction indicating innocence. Circumstances which standing alone are insufficient to prove or disprove any fact may be considered by you in weighing direct and positive evidence.

There are some general rules that apply to your discussion, and you must follow these rules in order to return a lawful verdict. First, you must follow the law as it is set out in these instructions. If you fail to follow the law, your verdict will be a miscarriage of justice.

There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in the matter. Secondly, the case must be decided only

upon the [692] evidence that you heard from the answers of the witnesses and seen in the form of exhibits in evidence and these instructions.

Third, this case must not be decided for or against anyone because you feel sorry or angry at anyone. Fourth, remember, the lawyers are not on trial. Your feelings about them should not influence your decision in this case. Fifth, your duty is to determine if the Defendant is guilty or not guilty in accord with law. My job as judge is to determine what a proper sentence would be if the Defendant is guilty.

Six, whatever verdict you render must be unanimous. That is, each juror must agree to the same verdict. Seven, it's entirely proper for a lawyer to talk to the witness about what testimony the witness would give if called to the courtroom. A witness must not be discredited for talking to a lawyer about testimony.

Feelings of prejudice, bias or sympathy are not legally reasonable doubts and should not be discussed by any of you in any way. Your verdict must be based on your views of the evidence and on the law contain [sic] in these instructions.

* * * * *

[Volume V, Record on Appeal, Case No. 67,583]

[752] MR. GUARISCO: Please the Court. Ladies and gentlemen of the jury, on behalf of the State of Florida, Mr. Hankinson and myself, I would like to thank you for your service and for your patience throughout this entire proceeding.

I know you've been back and forth, but there have been reasons for us to break like we have during this trial. I'd like to thank you also for your careful attention.

We've come to a very important part of this trial which involves a very difficult decision. It's not a pleasant task, but it's an important task for this community which you represent.

Even though at the beginning, Mr. Corin stated that there would be no doubt that the State would prove the case beyond and to the exclusion of every reasonable doubt, we had to go forth with the evidence because we were obligated to do so to [753] prove the elements of each and every crime to you and also to present evidence to you concerning factors that you would consider later in the penalty phase.

The evidence that you have heard in the guilt phase will be incorporated in to this penalty phase. The State of Florida will ask you to consider portions of that evidence concerning certain aggravating circumstances. Other evidence may be put on.

I want you to consider the evidence that you have already heard. Consider the other evidence that will be introduced. Consider carefully the arguments. The State of Florida at the end of this proceeding will come forth and will ask you to advise the Judge to impose the death penalty in this case based on the fact that a number of aggravating circumstances will have been proven. Thank you.

THE COURT: Mr. Corin for the Defense.

MR. CORIN: Good morning, ladies and gentlemen of the jury. As you know, this is my opportunity to discuss with you what I anticipate the evidence will show during this part of the trial. I would like to give you a little brief [754] outline.

Joe Elton Nixon is 23 years old. You didn't know his age, but you will find that out. Continuously since he was ten, he's been in trouble with the law. Properly, all these violations that he's had have caused him to be confined in various institutions: youth camps, halfway house, jails, prisons.

For example, I'm only talking about since he was an adult, not as a juvenile, but just simply since he's been an adult since 1980, he's been convicted of armed robbery, placed on 20 years probation. In 1981, he was sentenced to four years in prison based on a conviction in Quincy, Florida.

After his release from prison in July of 1983, he was charged with burglary of a dwelling. On that case, he was found guilty of an attempted burglary. He was on bail awaiting sentencing as an habitual offender on that case when he killed Jeanne Bickner.

Ultimately, he was sentenced to ten years in prison for that offense. While awaiting trial in this case, the one that you are sitting on, he's charged with and convicted of battery and assault [755] upon corrections officers at the Leon County Jail. For those offenses, he's been sentenced to a term of imprisonment for three years to run at the expiration of the ten-year sentence that I've just mentioned.

Since he's been confined in the Leon County Jail, the probation violation warrant has finally been lodged against his custody so that should he ever be available to be released from Florida's confinement, he would have to go back to Georgia.

As you will see – and sadly – his horrendous horrible actions were virtually predicted a long, long time ago, but I think what you will find maybe sadder or perhaps odder is that Mr. Nixon fell through some cracks in our system.

In August of 1984, Joe Nixon knew he was going to go back to prison for a long time. He was in love with a lady named Wanda Robinson whom you've heard testify. And you will hear her testify again. In fact, they had planned to get married, but for obvious reasons they didn't.

He had at that time some problems that apparently he couldn't nor could anybody else deal with. On August 8, 1984, four days prior to the death of Jeanne Bickner, Joe Elton Nixon called the [756] Leon County Sheriff's Department and said he wanted to speak to a deputy before he hurt someone. Two deputies responded to his call.

He requested that they take him to jail or somewhere, but quite rightly, since he had done nothing wrong, the deputies made sure that the situation that he was involved with at that time was under control, and they couldn't take him to jail. They left him at 910 Millard Street where he was staying with Wanda Robinson at the time.

During the early morning hours on Saturday, August 11, 1984, notwithstanding the fact that he was in love with Wanda Robinson, and in the presence of two police officers, he attacked Wanda Robinson at the intersection of Virginia and Macomb Street. He was arrested. He was charged with battery. He was given a notice to appear in Court and released from custody.

Late on Saturday, August 11th or some time perhaps during the early morning hours of Sunday, August 12, Joe Elton Nixon encountered Wanda Robinson and his brother John Nixon in the Frenchtown area. He was acting kind of crazy.

Apparently, through fear, Wanda and John did not return to Millard Street that night but spent [757] the evening in a motel in Chaires. On Sunday, when Wanda did return to her house, she found that Joe had left some notes at her house.

She thought that perhaps she had given those notes which were apparently a little strange to a law enforcement officer or that perhaps one of the [sic] Joe Elton Nixon's uncles, a man named LeMar, took the notes. I don't have the notes to show you. Apparently, they are simply not available.

Of course, we know that Sunday afternoon, Joe Elton Nixon kidnapped and robbed Jeanne Bickner. And two days later, he burned her car up. It's got to be obvious that Joe Elton Nixon is not normal organically, intellectually, emotionally or educationally or in any other way. He's not normal or right as we might commonly understand it.

I think from the documents and testimony that you will receive today and hear, that it's apparent that he's never been right. Now, of course, none of this serves to excuse or in any way justify the terrible thing that has happened, but hopefully this will give you, if you will, perhaps, a better picture of what is obviously a terrible or troubled or distorted individual.

I think that at the proper time based on that [758] information, there will be reasons why you should recommend to the Court that a life sentence be imposed. Thank you.

THE COURT: Who will you first witness be, Mr. Hankinson or Mr. Guarisco? Will you be handling the penalty phase?

MR. GUARISCO: No, sir, Mr. Hankinson will. I'd like to make an announcement for the record that at this time, the State of Florida would like to incorporate into the record of this

proceeding the testimony and evidence that was introduced during the guilt phase of this trial.

THE COURT: All right. The record will reflect that the prior evidence during the guilty/not guilty phase is hereby incorporated into the record appropriate for jury consideration in this phase. Mr. Hankinson.

MR. HANKINSON: Your Honor, at this time, we would offer to the Court two exhibits; the first exhibit which has been marked as State's Exhibit No. 1, Penalty Phase, is a judgment from Early County, Georgia, dated July 21, 1980, for the offense of armed robbery, one Joe Nixon.

The second exhibit that we would offer is a certified copy of a judgment from Leon County, [759] Florida, February 14, 1985, for battery and assault on a law enforcement officer.

Both of the judgments are certified copies of the judgment. We understand that the Defense is prepared to stipulate that these judgments were judgments that were rendered against the Defendant in this case, Joe Elton Nixon.

THE COURT: Correct, Mr. Corin?

MR. CORIN: Yes, Your Honor.

THE COURT: Let them this [sic] marked and received into evidence.

(WHEREUPON, STATE'S EXHIBITS NOS. 1 AND 2, PENALTY PHASE, WERE DULY MARKED AND ADMITTED INTO EVIDENCE.)

MR. HANKINSON: Next, the State would call Detective John Livings back to the stand.

* * * * *

Whereupon,

JOHN LIVINGS

was called as a witness, having been duly sworn, was examined and testified as follows:

THE COURT: Detective Livings was previously sworn and remains under oath.

DIRECT EXAMINATION

BY MR. HANKINSON:

[760]Q For the record, will you state your name, please, sir.

A John Livings.

Q And, I believe, you're previously indicated that you are a detective with the Sheriff's Department?

A That is correct.

Q And were the lead investigator in this case?

A Yes, sir, that's correct.

Q On the evening of August 14, 1984, did you have some discussions with the Defendant in this case, Joe Nixon?

A Yes, I did.

Q And where did these discussions take place?

A At the Leon County Jail in the booking room.

Q And approximately what time did these discussions take place?

A Between approximately 7:56 p.m. and 9:33 p.m.

Q And why were you there at the jail to meet with him?

A I was there to finalize all the paperwork and advise him of all the charges that he was being charged with, answer any question that he may have about what he was being charged with.

Q Now, prior to talking to him, did you advise him of anything?

[761]A Yes, sir, I told Mr. Nixon that he realized that he still had the right to remain silent; that he did not have to talk with me if he did not want to.

Q Did you repeat a full set of Miranda warnings that we've heard earlier from Major Campbell?

A No, sir, I did not.

Q Did he indicate he was willing to talk to you?

A Yes, it is.

Q Would you please relate to the jury basically the conversation that you had.

A I asked Mr. Nixon that something had been puzzling me and that I figured he could probably answer the question for me. I asked him what had happened to Ms.

Bickner's underwear. He stated that he had taken them off of her. I said, "Well, why did you take them off of her? What happened to them?"

He stated that he had burned them up. I said, "Why did you take her underwear off of her, Joe?" He said basically that he just wanted to scare her. He wanted to terrorize her a little bit more.

Q Now, Detective Livings, did you employ any kind of trick or subterfuge to get him to make these statements?

A No, sir.

[762]Q Did he know that you were a police officer involved in investigating this case?

A Yes, sir, he did.

Q Now, the information that you just related to us – did you put that in your police report?

A No, sir, I did not.

Q Why not?

A Just an oversight on my part.

MR. HANKINSON: Those are all the questions I have at this time.

MR. CORIN: No cross.

THE COURT: You may step down.

MR. HANKINSON: Your Honor, that's the testimony the State intends to produce in reference to the penalty phase.

THE COURT: Will counsel approach the Bench with the Court Reporter, please.

(WHEREUPON, A BENCH CONFERENCE WAS HELD AND THE FOLLOWING PROCEEDINGS HAD.)

THE COURT: Detective Livings' testimony was proffered previously to the Court. Defense counsel objected at that time. Out of an abundance of caution and in view of Florida's contemporaneous objection rule, I assume that counsel did not formally proffer that objection again in the [763] presence of the jury because the objection previously been made and the Court was aware of the nature of the objection. To have done so was futile. If you wish to now at the Bench Conference out of the presence of the jury note that for the record, you may do so.

MR. CORIN: Yes, sir, I obviously didn't wish to bring any further attention to the testimony in front of the jury. And since the Court had immediately – the first testimony today being Detective Livings – overruled my objection, I am of the opinion the Court wouldn't change its mind in that regard. Of course, as the Court notes, I didn't mean to abandon it or in any way to back off from my previously [sic] argument.

THE COURT: No, I just wanted the record abundantly clear that there had been no abandonment and also to make it clear that to have objected at that point would have been futile and no useful purpose would have been made. The Court now reaffirms its ruling.

Who would be your first witness?

MR. CORIN: I think I'll call Betty Nixon. She's not well. So, if I can get her first.

THE COURT: So, you are prepared to proceed [764] at this point?

MR. CORIN: Yes, sir, what we can do is put on Ms. Nixon and the doctors. I've told my doctors to be back at one.

(END OF BENCH CONFERENCE.)

THE COURT: Mr. Corin.

MR. CORIN: If I might, I'd like to call Betty Nixon, please.

THE COURT: Ms. Nixon has not been sworn.

* * * * *

Whereupon,

BETTY NIXON

was called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CORIN:

Q Ma'am, would you state your name, please.

A Betty Nixon.

Q And where do you live?

A 1700 Joe Louis Street.

Q And are you related to Joe Elton Nixon?

A I'm his mother.

MR. CORIN: Your Honor, if I might, since Mr. Nixon is not here just for formalities approach Ms. Nixon with a picture. I'd like to show her [765] State's Exhibit No. 17 and ask her if that's her son.

BY MR. CORIN:

Q Is that your son?

A Yes.

Q Ms. Nixon, how many children are there in your family?

A Eight.

Q Eight. And is Joe the oldest?

A No.

Q How many boys and how many girls do you have?

A Five boys and three girls.

Q And where is he in that number of children?

A He's the fourth.

Q Ms. Nixon, has Joe had a lot or problems with the law?

A Yes, he has.

Q When did you first notice that he had some problems?

A When he was about nine, between nine and ten years old.

Q Did he have problems in school?

A Yes, he did.

Q Because of the problems in school, was he in trouble with the law because of those problems, also?

[766]A Mostly, yes.

Q You and Joseph's father – do you live together?

A No, we don't.

Q You are separated?

A Yes.

Q At this time?

A Yes.

Q When Joe was coming up, what did you think of him as a child?

A What did I think of him?

Q Yes.

A Well, as a child, I guess, you know, I loved him. He was having a lot of problems in school. He was in and out,

you know, with the law, but I thought that he needed some kind of help because he didn't seem to be normal.

Q He didn't seem to be normal?

A No.

Q Did he have emotional problems or like mental problems or –

A Emotionally, mentally, you know. He had them.

Q When he was a youngster, did you take him to church?

[767]A Yes, we did. He was raised up in church.

Q And did you try to provide for him as best you could?

A Yes, we did.

Q Has Joe over the years been helpful to you?

A Yes, he has.

Q Have there been times when he's tried to do the things that you would expect?

A Yes, he has.

Q But there's been many times when he hasn't?

A That's right.

Q Ms. Nixon, did you want to come here today?

A Not really, but I am here. I don't mind.

Q You tried you best to raise him right, didn't you?

A I did.

MR. CORIN: Thank you. No further questions.

MR. HANKINSON: We have no questions, Your Honor.

THE COURT: You may step down. Call your next witness.

MR. CORIN: Your Honor, I'd like to call Wanda Robinson, please. She's been previously sworn, Your Honor.

[768]* * * * *

Whereupon,

WANDA ROBINSON

was called as a witness, having been duly sworn, was examined and testified as follows:

THE COURT: The witness was previously sworn. She remains under oath. Have a seat.

DIRECT EXAMINATION

BY MR. CORIN:

Q Ms. Robinson, once again, would you state your name and address, please.

A Wanda Robinson, 2502 Holton Street.

Q I think you have probably already identified Joe Elton Nixon. You do know Joe Elton Nixon, don't you?

A Yes.

MR. CORIN: If I may, Your Honor, show her State's Exhibit No. 17 again.

THE COURT: Yes, sir.

BY MR. CORIN:

Q Is that Joe Elton Nixon?

A Yes.

Q Ms. Robinson, when did you meet Mr. Nixon?

A It was right after he got out of prison. I would say about two years.

[769]Q In the summer of 1983?

A Yes.

Q Do you recall how you first met him?

A I think he came over to my house with his uncle.

Q And at that time when you first me Joe Elton Nixon, were you girlfriend/boyfriend with John Daniel Nixon?

A Oh, for some time, yes.

Q You had been with him at times?

A Yes.

Q Did you sort of break up with John in order to start going with Joe?

A No, me and John just couldn't get along.

Q And you started seeing Joe regularly when?

A Well, it was after he got out of jail. It was after he got out in December or January.

Q So, last year.

THE COURT: I'm going to ask the witness if she would speak up a little. I don't think the jury is hearing you clearly.

Q In the period of time just before Joe's arrest for murder, was he staying with you at 910 Millard Street?

A Yes, he was.

[770]Q Do you recall the week prior to his arrest? Did there come a time when Joe called the Sheriff's Department?

A Yes.

Q And there had been some problems, is that right?

A Yes.

Q And did officers come out to the house?

A Yes, they did.

Q They didn't take him at his word, did they?

A No.

Q That was the week before his arrest?

A Yes.

Q Now, on that same week, relate Friday night or early Saturday. Did Joe go after you, so to speak?

A Yes, he did.

Q Would you tell us about that, where you were and what happened.

A Well, he had told me he didn't want me to go to Frenchtown with my sister. I went anyway. He came down there and tried to jump on me.

Q And he hurt you or did he touch you?

A No, he tried. He just tore my shirt.

Q Were there police?

A Yes, there were two police officers standing [771] beside me.

Q Were there some other family and friends and people there, also?

A Yes.

Q Was Joe arrested at that time?

A Yes, they took him to the police headquarters.

Q And did you seem him again after that time?

A Yes, I did. He called twice from the police department. And then he came over where I was.

Q And then did you seem him then that same Saturday but later on?

A Yes.

Q Where was that?

A In Frenchtown.

Q And who were you with at the time?

A I was with John.

Q And can you describe how Joe acted, how he appeared?

A Well, he wasn't himself.

Q He wasn't himself?

A No, he was wild. He was looking wild, hiding behind buildings and stuff.

Q And did you have any discussions with him at that time?

[772]A Yes, John and I both. We talked to him about 30 minutes to an hour.

Q And then did you go your separate ways or did you go off together?

A We went our separate ways.

Q And where did you go?

A We went out in Chaires.

Q Whom did you go with?

A John.

Q And why did you do that?

A Because he told me that he knew his brother better than I did and that something was wrong with him, and he might hurt me.

Q And you were in love with Joe, but were you frightened at all?

A Yes.

Q Because of the way he had acted?

A Right.

Q Now, that was late Saturday night or early Sunday morning. After you spent the night in Chaires, do you recall about what time you might have gone back to your home at 910 Millard Street?

A It was after three o'clock that Sunday afternoon.

Q That would be the Sunday just before Joe's [773] arrest?

A Yes.

Q When you got back to the house, what did you find?

A Joe had left a lot of notes there. He had left about three or four notes there.

Q Do you recall what was in any of those notes?

A Yes, one of them said that he loved me and he was going to get something to eat. He would be right back. And then another one said if I wanted John, I better not come back to my house.

Q If you wanted John, you better not come home.

A Yes.

Q Who was with you when you found those notes?

A John and LeMar Nixon.

Q And do you have any idea whatever happened to those notes?

A No, sir, because LeMar had picked up two of them. I don't know what happened to them.

Q Did you think at one time you might have given them to some police officers?

A That's what I intended to do, but I couldn't find them when I went back to look for them.

Q Could you tell if in that time period, Friday and Saturday, whether Joe had been drinking or using [774] anything like marijuana or anything like that?

A He was drinking Friday night, you know, that Friday night, but I don't know about Saturday or Sunday.

Q You didn't see him early Sunday, did you?

A No, sir.

Q As I recall from your testimony earlier, the next time you saw him after Saturday, early Sunday morning, was on a Monday morning?

A Yes, 5:00 that morning.

Q And it was the next day he was arrested?

A Yes.

Q To your knowledge, was Joe aware that he was going back to prison last summer?

A Yes, he was.

Q And do you know he knew that he was going away for a long time?

A Yes.

Q And do you recall how many years he was probably going to be get [sic] sentenced to?

A Ten.

Q And is that based on discussions that you and he had with me about his case?

A Yes.

Q And that was prior to the time of his arrest for murder?

[775]A Yes, it was.

Q Ms. Robinson, do you have any children?

A Yes, three.

Q Are they by Joe or some other person?

A No, no Nixon kids.

Q So your children – did they spend some time with Joe?

A Yes, they were real fond of Joe.

Q While he lived with you and stayed with you, did he try helping you with your children?

A Yes, he took up a lot of time with the kids.

Q Did the kids like it?

A Yes, still do.

Q You still love Joe?

A Yes.

MR. CORIN: Thank you. No further questions.

CROSS EXAMINATION

BY MR .HANKINSON:

Q Just a couple of questions, Ms. Robinson. The incident Friday night that you talked about – you were trying to get Mr. Nixon mad at you weren't you.

A No.

[776]Q Weren't you trying to tease him in front of the police officers trying to get him mad with you?

A No, I was not.

Q You weren't trying to get him in trouble?

A No.

Q Now, was Joe Nixon jealous of John Nixon because of you?

A No, they told me they always had that jealousy thing between the two of them.

Q It wasn't because of you?

A No.

MR. HANKINSON: Thank you.

THE COURT: Anything further, Mr. Corin?

MR. CORIN: No, Your Honor.

THE COURT: You may step down. Call your next witness.

MR. CORIN: Your Honor, I'd like to call Brian Henry, please.

* * * * *

Whereupon,

BRIAN HENRY

was called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CORIN:

[777]Q Would you state your name, please.

A Brian Henry.

Q And your occupation?

A I'm a communications supervisor with the Sheriff's Department.

Q And were you so employed on Wednesday, August 1, 1984?

A Yes.

Q And where [sic] you working during the evening hours that day?

A Yes.

Q And do you recall receiving a call from a black male that identified himself as Joe Nixon?

A Yes.

Q And you received that call in the normal course of your duties?

A Yes.

Q Can you recollect approximately what time it might have been.

A The white card states about 9:30. I don't remember right off the bat, but I think it was around 9:30 or 10:00 that evening.

Q Did you fill out a complaint card?

A Yes, sir.

Q And did you bring that card with you today?

[778]A Yes.

MR. CORIN: Your Honor, if I could, I would like to move to introduce the card. I think since it's normally kept in the course of business in the Sheriff's Department. I would like to introduce at this point, given my pre-existing numbering, as Defense Exhibit No. 50 and then ask perhaps if the Clerk might could make a copy of it and then return to Mr. Henry so that he might maintain it in his files.

THE COURT: Is the document ordinarily kept in the course of business conducted in the Sheriff's Office

MR. CORIN: Yes, Your Honor.

THE COURT: Routinely?

MR. CORIN: Yes.

THE COURT: Is there objection?

MR. HANKINSON: No.

THE COURT: I'll go ahead and admit it into evidence and authorize the Clerk's Office to make a copy of the document and to be inserted in lieu of the original; the original be returned to the officer and to the Sheriff's Office.

MR. CORIN: Your Honor, while I have the officer on the stand, I would ask that the officer [779] read the informational portion of the card for the jury.

A The card states: Signal 22 which is a disturbance. The complainant said he wants to talk to a deputy before he hurts someone. The complainant will meet the deputy out front of his house. Respond to 910 Millard Road, a brick house. On the complainant line, it says Joe Nixon, a black male.

MR. CORIN: Your Honor, I have no further questions.

MR. HANKINSON: I have no questions.

THE COURT: Mr. Clerk, secure the evidence and make a copy of it. It will be returned to the Sheriff's Office after the copy is made. You may step down. Mr. Corin.

MR. CORIN: Yes, Your Honor. If I could, call Deputy James Clifton.

* * * * *

Whereupon,

JAMES CLIFTON

was called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CORIN:

Q Would you state your name and occupation.

[780]A James Clifton, deputy sheriff.

Q And how long have you been so employed?

A I've been employed here for just over two years, sir.

Q Well, you were employed there [sic], but were you in the normal performance of your duties as a deputy on August 8, 1984?

A Yes, sir.

Q And during the evening hours, were you dispatched to 910 Millard Street?

A Yes, I was.

Q And do you recall about what time you got there?

A It was approximately 10:29, I believe it was. 10:26.

Q Were there other officers with you at that time?

A I was riding by myself that night, sir. Deputy Bevis was already at the scene when I got there.

Q And did you meet up with a black male?

A Yes, sir.

Q And did that black male give you a name? Did you know whom you needed to talk to?

A When I got there, Bevis had already been there for a while. I pulled in there beside him, asking [781] him what he had. He informed me then that Mr. Nixon – the lady there had had a problem.

Q Let me, if I could, show you State's Exhibit No. 17. Is that the man you spoke with that night, or can you tell?

A Yes, sir, I believe that's him.

Q How long were you there that night at 910 Millard Street?

A About ten minutes, something like that, sir.

Q Did Mr. Nixon request that you take him to jail?

A Not to me directly. At the time I pulled up, he was sitting at the curb there talking with Deputy Bevis. I heard part of the conversations which he said: Take me to jail.

Q You overheard that?

A Yes, sir.

Q But he hadn't done anything wrong?

A No, sir.

Q Did you discuss anything with a woman named Wanda Robinson or a black woman? Maybe you didn't get a name.

A Yes, sir. I talked with her briefly again just to make sure that she was all right. Tried to find out something of what the problem was there.

[782]Q And in your professional judgment, there was nothing untoward happening?

A No, sir, not at that time.

Q And you left?

A Yes, sir.

MR. CORIN: Thank you very much.

THE COURT: Mr. Hankinson.

CROSS EXAMINATION

BY MR. HANKINSON:

Q I just wanted to clear one thing. The bulk of the dealings with Mr. Nixon was by Deputy Bevis?

A Yes, sir.

MR. HANKINSON: Thank you.

MR. CORIN: Your Honor, I'd like to call Deputy Greg Bevis.

* * * * *

Whereupon,

GREG BEVIS

was called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CORIN:

Q Would you state your name and occupation, please.

A Greg Bevis, deputy sheriff.

[783]Q How long have you been with the Sheriff's Department?

A Four years.

Q On August 8, 1984, do you recall what hours you were working that day?

A From three in the afternoon until eleven at night.

Q And in the normal course of your duties, were you asked to go to 910 Millard Street?

A Yes, sir.

Q And what information did you have before you got there?

A I proceeded to a call reference to a disturbance between a girlfriend and boyfriend at that address.

Q When you got there, were you alone? In your car alone?

A Yes.

Q Let me show you State's Exhibit No. 17 and ask you, if you would, can you identify this person.

A Mr. Joe Nixon.

Q Is that the gentleman that you saw there on August 8, 1984?

A Yes.

Q Tell us about what happened when you got [784] there.

A I arrived at that address. Mr. Nixon was sitting on the curb on the side of the road on Millard Street. I asked him if he called the Sheriff's Office. He said he did. I introduced myself. I asked him if I could help him.

He stated that he wanted to go to the county jail. I asked him why. Did he break the law and commit a crime. He said no. I said, "I can't very well take you unless you break the law. Tell me what's going on." He said, "Me and my girlfriend are having a little disagreement. I want to leave."

I saw no problem with there [sic]. I'll see that you leave. If you want to leave, I'll give you a ride. At that point, I don't remember. I'm sure I said something else to him. I don't know what. I told him I was going to speak with her.

So I went across the street and went down in the front yard. She was walking out of the house. I told her, "I understand you and Mr. Nixon are having a little disagreement. He wants to leave. Do you have any problems with that?" She said no. I said, "Well, will you take him uptown or wherever he wants to go?" She said, "I'll give him a ride." I said fine.

So I went back and spoke with Mr. Nixon. I [785] said, "She'd be glad to give you a ride. You need to separate for a few days. Maybe when things cool off, call on the phone and you can work things out over the phone." He said fine. And then I left.

MR. CORIN: Thank you.

THE COURT: Mr. Hankinson. Cross examination.

CROSS EXAMINATION

BY MR. HANKINSON:

Q So, basically, what it boiled down to is he wanted a ride away from there?

A Yes.

Q And you arranged a ride for him?

A Yes.

Q And he indicated that was fine with him?

A Yes.

Q Did he ever say anything about hurting anyone?

A No, sir.

Q Did you note any signs of extreme emotional distress?

A Not that I could tell, no, sir.

Q And, so, basically, it wasn't any big deal there when you got there?

A They both were separated. Things were calmed [786] down.

Q He was relatively calm when you talked to him, not particularly upset or angry?

A Exactly.

Q And that was the end of your contact with him?

A That day?

A Yes.

MR. HANKINSON: Thank you.

MR. CORIN: No further questions.

THE COURT: You may step down.

MR. CORIN: Your Honor, maybe just one more witness. It would be Officer Eldridge.

* * * * *

Whereupon,

W.M. ELDRIDGE

was called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CORIN:

Q Officer, would you state your name and occupation?

A W.M. Eldridge.

Q And your occupation?

A Police officer.

[787]Q City of Tallahassee?

A Yes.

Q How long have you been so employed?

A Thirteen years.

Q And were you working as a police officer on August 11, 1984?

A Yes, sir.

Q Did you have occasion on that date to arrest Joe Elton Nixon?

A Yes, I did.

Q And if I might, I'd like to show the officers State's Exhibit No. 17 and ask if you could identify this individual?

A (Examining photograph.) Mr. Joe Nixon.

Q This is the man you arrested then on August 11th?

A Yes.

Q 1984. Were you by yourself at the time of the arrest?

A No, sir, I was accompanied by Officer Riley.

Q And for what offense was Mr. Nixon arrested?

A Battery.

Q And who was the alleged victim of that offense?

A Wanda Robinson, who is his girlfriend.

[786]Q Do you recall the time?

A The time of the arrest?

A Yes, sir, it was 12:45.

Q You are refreshing your recollection from the report then?

A Yes, I am.

Q And this occurred where?

A It was the corner of Virginia and Macomb Street there at the old Tropicana poolroom.

Q And what did you observe that caused you to arrest Mr. Nixon?

A We were on walking assignment that night. We were standing at the corner watching people. Joe Nixon and Ms. Robinson were on the corner. She didn't want to leave. He

wanted her to leave. She didn't want to. They got to arguing. She threw down a beer can, I remember, and walked around us.

We were standing at the utility pole there, and she came around us. When she did, she increased her pace. I knew then she was fixing to run from him for some reason for [sic] another. So, he reached out and tried to grab her. I grabbed him and he did grab her. Officer Riley grabbed him. We had to pull him away from her. I think he hit her once or twice and knocked her down.

[789] As soon as we got him separated from her, we were assisted by two other men who were there in the crowd and we got him off of her. He calmed right down. We arrested him and called the car down there. And they transported him, and we went to the station. He was calm. When we got to the station, he met the criteria to be released on his own recognizance. So, we had him sign a notice to appear. He went and he left.

MR. CORIN: Thank you very much.

CROSS EXAMINATION

BY MR. HANKINSON:

Q So, the incident we're talking about – would this be shortly after midnight which would be late Friday night/early Saturday morning depending on how you look at it?

A Yes.

Q Before Ms. Robinson came over to you, did she see you there, the police officers there?

A Yes, I think she did. She was approximately, at the most, seven or eight feet away from us when they were talking.

Q And you were in uniform?

A Yes.

Q And did it appear that she was trying to tease him or taunt him to get him to come after her?

[790]A I wasn't under that impression at first. I think that she just didn't want to go. I knew she was not afraid of him. At one point, she acted like she was mad. I was kind of listening to the conversation anyway. Any time anybody is kind of having an argument, you realize that it can escalate and get verbal and get out of the [sic] hand especially in that area down there.

When she threw the beer can, that's when I started paying attention it may be escalating. It did.

Q Was this incident that you observed – was that an uncommon incident for the area where you were there by the Tropicana?

A No, sir, it wasn't.

Q Now, were any real serious blows struck? I mean, was Wanda Robinson injured to any extent or anything?

A No, she said she wasn't. Of course, I don't know. We were holding on to him. He may have hit her again.

Q Now, I believe you indicated as soon as you had separated the two of them, that the Defendant had calmed down?

A Yes, sir, calmed right down.

Q And about how long were you with him?

A About an hour maybe.

[791]Q And during that period of time, was he calm?

A Yes.

Q And rational?

A Yes.

Q And what did he say to you?

A He told me he gotten mad. She really made him mad. He was all right. He understood that everything was over.

Q Did he apologize to you?

A He did to me, yes, sir.

Q Did he appear to be under the influence of any extreme mental or emotional disturbance?

A No, sir.

Q While he was with you, did he make any phone calls?

A Yes, sir.

Q And whom did he call?

A He called Ms. Robinson.

Q The lady that you testified that he hit?

A Yes.

Q And could you hear his end of the conversation?

A Just part of it. I was under the impression – I don't remember exactly what he said, but I was under the impression that he was trying to make up [792] to her.

Q It wasn't an angry conversation?

A No, it was very low key.

Q And basically, it sounded like they were working out whatever problems they had?

A Yes.

Q And did you release him that night?

A Yes, I did.

Q Whom did you release him to?

A The man was his uncle. He identified himself as an uncle. He also helped us – he was in the car, and he was trying to get Ms. Robinson to leave him.

Q So you released him to his uncle?

A Yes, he said he was.

Q And that was after you had been with him about an hour?

A Yes.

Q When you released him, was the Defendant calm?

A Yes, sir.

Q Rational?

A Yes.

Q See any signs of, you know, that he was extremely upset about anything?

A No, sir.

[793]MR. HANKINSON: That's all the questions I have.

THE COURT: Redirect.

MR. CORIN: No, sir, I just need to retrieve my copy of the report from the officer. Thank you, Your Honor. Could counsel approach the Bench with the Court reporter.

(WHEREUPON, A BENCH CONFERENCE WAS HELD AND THE FOLLOWING PROCEEDINGS HAD.)

MR. CORIN: The doctors are the only witnesses I have left. I told them both to come back about one.

THE COURT: How many of them do you have?

MR. CORIN: Just two. Dr. Dorman and Dr. Ekwall. What I'd like to do is released [sic] jury to come back at 1:15. And then I would like to formerly move my other exhibits into evidence. I've got them in order, and I've given the Clerk a numbering key to all them, just go ahead and get those in while the jury is out. I can do it in the jury's presence.

THE COURT: How long will that take?

MR. CORIN: If the State has no objections, I'm just going to move them in to evidence and have them numbered 1 through 50.

[794]MR. HANKINSON: I think it should be done in front of the jury that they be offered in to evidence.

MR. CORIN: That's fine.

MR. GUARISCO: They should be pre-marked.

THE COURT: Why don't we go ahead and break until 1:15 and go ahead and get the logistics lined up. And we'll go ahead and take the doctors at 1:15. How long do you think they are going to take?

MR. CORIN: Forty minutes.

THE COURT: And then we'll just go ahead and pump up those exhibits then.

MR. CORIN: Well, I think maybe what we can do is I'll given them to the Clerk in the order. He's got a key. And then I'll just move them in when the jury comes back.

(END OF BENCH CONFERENCE.)

THE COURT: Ladies and gentlemen of the jury. We'll take a lunch recess at this time and reconvene at 1:15 for – I think you have two more witnesses and then some exhibits.

MR. CORIN: Yes, Your Honor.

THE COURT: We'll be in recess until 1:15.

(RECESS TAKEN FROM 12:00 TO 1:15 P.M.)

[795]THE COURT: Do we have anything to bring up before the jury comes in?

MR. CORIN: Just, I think, when the jury comes in, if I could then just move my documentary exhibits into evidence. I don't know which would be the best. Just refer to them as Exhibits Nos. 1 through 49. And No. 50 has already been introduced. Exhibits with those numbers for the Defense.

THE COURT: Have they already been marked for identification?

MR. CORIN: Yes Your Honor, they have.

THE COURT: I think all you have to do would just simply be to move Defense Exhibits 1 through 49 into evidence. No objection. They would be in.

MR. CORIN: Thank you.

THE COURT: Bring in the jury.

(JURY ESCORTED IN THE COURTROOM.)

THE COURT: All right, sir. Mr. Corin, you indicated you have a motion at this time?

MR. CORIN: Yes, Your Honor. I would move for the admission of the Defense Exhibits Nos. 1 through 50. They are documentary in nature and have been already marked by the Clerk for identification purposes.

[796]THE COURT: No objection from the State?

MR. GUARISCO: No objection.

THE COURT: Let the record show the documents Defense Exhibits 1 through 49 now be received into evidence.

Mr. Corin, you may proceed.

MR. CORIN: Your Honor, I'd like to call Dr. Ekwall.

* * * * *

Whereupon,

MERTON EKWALL, M.D.

was called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CORIN:

Q Doctor, would you state your name, please.

A Merton L. Ekwall.

Q And what is your occupation?

A Physician and surgeon.

Q And do you have a field of speciality?

A Yes, I limit my practice to neurology and psychiatry.

Q Doctor, if you would, would you explain a little bit about your background, education, training and experience.

[797]A I graduated medical school at the University of Nebraska in 1946, had a year's rotating internship at the Santa Barbara California Cottage Hospital. Two years of residency training in psychiatry at Nebraska State Hospital.

MR. CORIN: Doctor, I think the State might be willing to accept you as a expert.

MR. GUARISCO: Your Honor, we'll stipulate that Dr. Ekwall has testified in the circuit courts as an expert.

THE COURT: And acknowledge that he's subject to declaration by the Court as an expert in the field of neurology and psychiatry.

MR. GUARISCO: Yes, sir.

THE COURT: Ladies and gentlemen of the jury, the witness before you is now declared by the Court to be an expert in the field of psychiatry, neurology. And like all experts, he is like all other witnesses with one exception. By virtue of that training and expertise, he has by his qualifications established his right to place before you an opinion for your consideration not limited to mere factual recitations.

Mr. Corin, you may proceed.

BY MR. CORIN:

[796]Q Dr. Ekwall, did you examine a man by the name of Joe Elton Nixon?

A Yes.

MR. CORIN: If I may, Your Honor, I'd like to ask Dr. Ekwall to examine State's Exhibit No. 17 and see if that's the gentleman that he examined.

A Yes, that appears to be the same man.

Q Thank you. Doctor, was that examination of Mr. Nixon done at my request?

A Yes.

Q And over what period of time did you examine Mr. Nixon?

A I examined him on two separate occasions in my office. The first was on March 28th of this year, at which time he did a psychological testing and we obtained the preliminary history from him, and then again on April 11th, 1985, at which time we did more examinations.

Q You've written a report concerning Mr. Nixon; have you not?

A Yes.

Q And you completed your examination of Mr. Nixon prior to the writing of your report?

A As much as I felt I could.

Q Did you have additional information and [799] documents concerning the case and Mr. Nixon in performing your examination?

A Yes, before I ever saw him, I had the privilege of going over reports of psychiatrists and his various workers that have worked with him through the years. He had been in disciplinary trouble ever since he was a young boy aged ten. And there were many psychiatric reports and psychological reports that I had a chance to go over before I saw him.

I think this was important that the reports from way back showed that there is something about this boy that nobody could quite understand, and they felt that there must be something neurologically wrong or something wrong some place because he was different from others.

Q Did you conclude that he was different from others based on your examination?

A At the end of my examination, that's still my opinion that he's different.

Q How so? Can you explain that a little further to the jury.

A Well, you have to go into all the details of this boy's life. The main thing that originally came up was he just didn't seem to respond to discipline or to direction or he didn't seem to learn from experience. [800] He just was not the kind of boy that, at least in Marianna, that they felt they could really help. Every time he went there, he came out just the same as when he went in. He didn't change. The psychiatrists wondered about this. They determined he wasn't psychotic. He wasn't neurotic.

They really couldn't find any illness to account for it. Physically healthy. Everything about him looked good except he just wasn't quite right. On that basis, I felt it was important to try and investigate neurologically whether or not he had something that we could find to account for why he's different.

On that basis, I did some psychological testing in my office. I did a electroencephalographic trcing [sic], a brain wave tracing. I did a neurological examination, all the usual psychiatric evaluation [sic] evaluations. And still, it's difficult to come to any definite reason why he is the way he is.

Q He's not psychotic as that term would be traditionally know in the psychological or psychiatric circles?

A I could not find any evidence of gross psychosis. He has brief psychotic episodes, as far as psychiatry is concerned, when he's intoxicated or when [801] he's under the

influence of drugs and so forth. These are what we call psychotic, but they are not diagnosable diseases. He doesn't have the disease.

Q Did you have an impression as to whether he was participating in your testings to the full extent of his capabilities as opposed to someone who was being a little disingenuous or trying to cover up?

A He was quite cooperative in my office and answered all questions and would even volunteer some information. He seemed to give a very good history. And yet, because of the past history I had obtained from other sources about his ability to fabricate and tell lies, I was a little on the suspicious side of the story, but his story to me sounded logical and sounded coherent when he gave it to me.

However, I found out since then that the story he gave me is different than the story he's given to other doctors and different than the story that he gave the Sheriff's Department.

Q So, there are several stories?

A Several versions of what was going on.

Q That would be consistent with your report where you indicate he has a life-long history of lying?

A Yes.

Q Creating fantasy situations. Blaming others [802] for his troubles?

A All this is very – I can't think of a good word. You never can predict when he's lying and when he's not. He doesn't have any mannerisms that I could discover that would

determine. He tells the truth as he sees it which is not necessarily the truth to anybody else.

Q Do you have an opinion on his intelligence?

A He didn't complete school. Of course, his formal schooling was interrupted by all the incarcerations. He was sufficiently intelligent to solve simple problems. Was able to do serial seven subtractions fairly well. He made quite a few errors, but at least he could subtract. He could add. He could multiply. He knew the usual current events. His intelligence is on the low side of normal, but it's adequate.

Q Do you have an opinion about whether when he killed Ms. Bickner whether he was under some influence of a mental or emotional disturbance?

A Oh, I'm sure he was. From the story I got from him, he had been emotionally disturbed for some time and was rather distraught. And then his whole story is complicated by, not only his mental and emotional state, but also he uses alcohol. He uses [803] pot. He freebases cocaine. All these other factors disturb his ability to think and to reason and to use judgment.

Q That my [sic] not be your conclusion but would it be fair to say that – could you come to the same conclusion if there was no totally objective evidence that he was using those substances at the time of her death? In your circle of expertise, that's known as a self-reporting information?

A That's true. This is the story he gave me, but it had been substantiated by previous reports that he had been using these things at times when it was not a factor in the decision.

Q Would you have an opinion about whether when Jeanne Bickner was killed, Mr. Nixon's capacity to appreciate

his criminality to his conductor [sic] or to conform that conduct to the requirements of law was impaired?

A Oh, yes, I feel it was impaired. He just doesn't operate with a full reasoning capacity, especially at that time. You have to go back several days and see the build-up of the pressures that he was having with his girlfriend, lack of sleep. He'd been up all night, several nights, driving around, drinking up a lot of alcohol. He was just losing control all the time.

[804]Q You do have an opinion as to his competency for trial, don't you?

A Well, for legal competency trial purposes, I'd have to state that in the absence of any diagnosable psychotic illness or severe neurotic illness, the law says he's competent and capable of standing trial. He's not the most competent individual in the world as far as making decisions is concerned.

MR. CORIN: Thank you very much, Doctor.

THE COURT: Cross.

<u>CROSS EXAMINATION</u>

BY MR. GUARISCO:

Q Dr. Ekwall, you were appointed to assist defense counsel in the preparation of his defense?

A Yes.

Q In fact, isn't it true that the purpose of your testimony is to assist Joe Nixon in avoiding the death penalty in this case?

A Well, it's to assist him in finding out whether there was any incompetency or anything that could be found to understand this case.

Q For mitigation purposes in the penalty phase.

A Yes.

Q Do you believe in capital punishment, Doctor?

A I do.

[805]Q Now, your neurological examination of Joe Nixon – was that within normal limits?

A Yes, when we just talk about a neurological examination, examining the cranial nerves, the nerves of the body to see if they are functioning – they were all intact and all within normal limits. I was looking for a possible injury because he had a history of being hit on the head with an iron pipe several years ago and was unconscious.

And I thought maybe he might have had some sort of epileptic focus that might be a reason for why he did what he did and does he what does, but I could not find any evidence of it.

Q So, there was no evidence of any neurological disease or damage?

A Not from my testing on the electroencephalogram.

Q Now, you stated that these crimes occurred in 1984. You examined Mr. Nixon in 1985; is that correct?

A Yes.

Q How long did these examinations take?

A They took about six hours altogether in my office.

Q Now, regarding your report, I believe, in your testimony you mentioned the fact that he had used [806] cocaine, marijuana, alcohol, and had lack of sleep. Who gave you that information?

A This information was from what he gave me as he described his day-by-day activities over the dates prior to and following the killing.

Q Did you verify this information that he gave you?

A I verified it as much as I could by discussing with Mr. Corin to see what facts had been brought out by others. It seemed to fit generally the pattern, although we had found some discrepancies in some of the details as he gives them and the details as they actually happened. He lost track of dates.

Q You said that you read the reports of Mr. Corin submitted and that he has introduced into evidence; is that correct?

A Yes, I read considerable.

Q Do you recall in those reports comments made by the Defendant to individuals that he did not use alcohol and did not use drugs.

A That was stated in the reports back when he was 10, 12 and 13, but from 16 on, they all say he admits moderate use of alcohol or moderate or occasional use of drugs.

Q Have you ever had people that you were [807] evaluating lie to you?

A I'm sorry?

Q Is that common for people that you are evaluating to lie to you?

A To some degree. Actually in the situation wherein those who are competent pretty well understand the necessity to be as honest and truthful as possible and to try and help bring out the facts so that we can deal with the facts when we talk with them.

Q You made the statement that Mr. Nixon told you the truth as he saw it. What does that mean?

A Well, he told me the story as he told it to me hour by hour, and I felt at the time that probably was fairly factual because he gave it in such a way that I felt it was factual.

Q Could it also mean that he was telling you what he wanted you to know for the purpose of this examination?

A I'm sure he was capable of making that distinction and didn't tell me anything he didn't want me to know.

Q Did you tell him why he was being examined?

A Yes.

Q And what did you tell him?

A I told him that he had been referred to me [808] by his attorney and that I was serving as an expert witness and that all things we talked about were such that if they were against

him in any way, it wouldn't have to be brought out. I would be privileged communications, but the examination was for the purpose of finding out why he acted the way he did.

Q And you also say that it would be used in the penalty phase to assist him?

A I didn't because I didn't know that I would say used.

Q Did he know that?

A Did he know that?

Q Yes.

A I'm not sure.

Q Did you interview any of his relatives or friends that observed him prior to and after the murder of Jeanne Bickner?

A No, I did not. That information is separate from the examination that I've performed.

Q Did you read any of the statements that these relatives or friends may have made to law enforcement officers?

[809]A I've read what's come out in the newspapers and what you hear on television but it, but I've been told about it. He was able to tell me some of the things that his brother had said and how he felt about him.

Q But you never interviewed his brother?

A No.

Q Did you listen to his tape-recorded statement to Major Larry Campbell?

A I did not.

Q Did you read the transcript of that statement?

A No, I just heard what was in the television and newspapers the other day which was different than the story I got from him.

Q So, basically what you are telling us here today is that you relied upon what Mr. Nixon told you and what Mr. Corin told you and provided you?

A. Yes, I thought he was a pretty disturbed boy by what he told me. But what comes out in these other stories is even more bizarre yet.

Q Did you recall reading in these reports that Mr. Corin submitted to you that Joe Nixon was very manipulative?

A He can be. When a person gets to know him, [810] they can become quite friendly with him.

Q That he can turn things on and off?

A. He can be very impulsive.

Q That he can give you answers that he feels that you want to hear?

A Yes, I feel he sort of wants to put the best foot forward, although he didn't try and hide the facts of what he did or how he let me know the facts of what he did.

Q Would you classify Joe Nixon as antisocial personality?

A The exact classification has been difficult. We know for sure that he has a personality disorder, but he has –

Q Well, yes or no. Would you classify him as antisocial personality?

A I would. That's part of my – a portion of my diagnosis.

Q And isn't it a fact that a great majority of the people in prison and on death row have antisocial personality disorders?

A Yes, that's true.

Q It's your opinion though that the Defendant is sufficiently free of mental defect disease or derangement; is that correct?

[811]A. Well, my conclusion was that even though he had some brain dysfunction, even though he has drug and alcohol problems, he still does not – .

Q Well, no, Doctor. I'm asking you – in your report you stated that the Defendant is sufficiently free of mental defect, disease or derangement. Now, is that a correct statement from your report. Yes or no?

A I can't answer that. It's not a complete statement.

MR. CORIN: Your Honor. Perhaps if the Doctor was afforded an opportunity to see the complete sentence that counsel refers to, he can give a proper answer.

Q Do you have your report here?

A Yes.

Q You state on the bottom of page two, "As a result of my examination, it's my opinion that Mr. Nixon is sufficiently free of mental defect, disease or derangement and that he would be found competent to stand trial and be held responsible for his actions."

A. Yes. When you complete that statement, why, yes, that was my conclusion because I could not find any overt psychosis or neurosis to legally render him incompetent.

Q And isn't it a fact that Mr. Nixon has the [812] ability to appreciate the criminality of his conduct?

A He knows that what he's done is wrong. He doesn't feel it is wrong as others seem to feel it.

Q In fact, you told me yesterday on the telephone that he did appreciate the criminality of his conduct because he tried to destroy evidence.

A That was one of the reasons why he would be found competent; that he knew that what he did was no acceptable, and he was trying to figure out how to rectify what he had done.

Q Can you predict what Mr. Nixon is going to do in the future?

A I'm still at a loss to really fully understand his behavior, and I will not be able to predict it. I don't feel he's a very good risk for society.

Q Now, I gather from the opinion that you stated to Mr. Corin about his condition during the commission of the crime that you really are not too firm on that opinion; is that correct?

A Too firm on my opinion?

Q You don't have a firm opinion as to his condition when he committed the crime or the murder of Jeanne Bickner?

A. No, other than going over the complete [813] longitudinal history and knowing he's been an angry young man all along; that he does things to attract attention; that he will deliberately commit crimes, steal, shoplift right in front of people; that 48 hours before this he was trying to fight with Wanda right with the policeman standing right there at the elbow. He just doesn't fit the usual criteria of somebody who is fully competent.

Q So, your opinion is not a firm one regarding his condition at the time of the offense?

A That's correct. I'm not –

MR. GUARISCO: Thank you, Doctor.

THE COURT: Redirect examination.

REDIRECT EXAMINATION

BY MR. CORIN:

Q Just a couple of things. Doctor. Mr. Guarisco asked if you were essentially hired by me.

A Essentially, yes.

Q Doctor, at any time during the period of time since your appointment as an expert to examine Mr. Nixon and this moment, have I ever indicated to you what result, conclusion, opinion I expected from you as an expert?

A No, none whatsoever. I evaluate somebody and give my own opinion.

[814]Q Did I tell you that I wished you would conduct your examination and if you are called as a witness, to give the most honest impressions you could of Joe Elton Nixon.

A I don't recall the exact request, but that's what I do when I examine somebody.

Q That's what you've done today?

A It's been a very confusing case psychologically and neurologically.

MR. CORIN: Thank you, sir.

MR. GUARISCO: No further questions.

THE COURT: You may step down. Mr. Corin.

MR. CORIN: Your Honor, we'd like to call Dr. Doerman, please.

* * * * *

Whereupon,

ALLEN DOERMAN

was called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CORIN:

Q Sir, would you state your name, please.

A My name is Allen L. Doerman.

Q And what is your occupation?

A I'm a clinical psychologist.

[815]Q And do you have a field of speciality?

A Yes, neuropsychology.

Q And can you tell us a little bit about your background, education, training, experience, things you've done.

A A have a Bachelor's Degree from Thomas Moore College in Kentucky. I have a Master's Degree in clinical psychology from Xavier University in Cincinnati and my Doctoral Degree is from Wright State University in Dayton, Ohio.

I did my internship at the VA Hospital in Cincinnati. Half of that internship was specificialization [sic] in neuropsychological testing. Afterwards, I did one year's post-doctoral training under the supervision of a diplomate at the Cincinnati Neurological Institute. And following that year, I worked there for one year as a neuropsychologist.

Q How long have you been practicing in Tallahassee?

A I've been here since December of '84.

Q And pursuant to your practice, have you examined individuals based on Court appointments?

A Yes.

MR. CORIN: Your Honor, I would submit Dr. Doerman as an expert in the this [sic] stated field.

[816]THE COURT: Voir dire.

MR. GUARISCO: Yes, Your Honor.

VOIR DIRE EXAMINATION

BY MR. GUARISCO:

Q Have you testified as an expert in the Circuit Court here in Leon County before?

A No, sir.

Q Have you testified in any Court as an expert?

A I testified in deposition, but not in a courtroom.

THE COURT: Is there objection?

MR. GUARISCO: No objection.

THE COURT: Ladies and gentlemen of the jury, now, I now declare Dr. Doerman to be an expert in the field of neuropsychology qualified to place an opinion before you for your consideration. Mr. Corin.

CONTINUED DIRECT EXAMINATION

BY MR. CORIN:

Q Doctor, were you appointed to examine a man by the name of Joe Elton Nixon?

A Yes, sir, I'd [sic].

Q I'd like to show you State's Exhibit 17 and see if you can identify that photograph.

A That's Joe Nixon.

[817]Q This is the man that you examined pursuant to a Court appointment at my request?

A Yes.

Q Over what period of time did you examine Mr. Nixon?

A I worked with him a total of seven or eight hours, somewhere in there, through over almost a month's times. I saw him first in my office, and then I saw him on several occasions at the Leon County Jail.

Q A total period of seven or eight hours?

A Yes.

Q And can you tell us that types of tests that you conducted upon Mr. Nixon. You are free to refer to your report. Your report has been admitted into evidence.

A I put him through a battery of neuropsychological tests and also a battery of personality tests. Should I go on?

Q Sure.

A The neuropsychological tests look at the correlation between behaviors and brain function. For example, the ability to do this. You have to have intact muscles and nerves in your hand and arm, but there's also a part of the brain called the motor strip which has to be functioning.

[818] I put Mr. Nixon through several different tests which look at different behaviors which are correlated with parts of the brain. I compared his functioning on those tests to those of a normal adult.

Q Other types of tests that you conducted?

A In the personality testing, there was an IQ test.

Q Did you come to the conclusion about his IQ at the end of your test?

A On the Wexler [sic] Adult Intelligence Scale, he achieved a full scale IQ – I believe it was 74 which is in the borderline range. Average intelligence is seen as beginning at 90. Low average begins at 80 IQ, and between 70 and 80 is in the borderline range. Below 70 is considered mentally retarded.

Q Based on some of the testing, did you come to a conclusion about whether there was an indication of brain damage?

A The focus of my neuropsychological testing was a group of tests that's called the Halsted-Reitan battery which is a well-accepted group of tests which look at brain functioning. On that, there are cut-off scores from brain damage versus nonbrain damage. Of those tests, all of them were in the brain damage range.

[819] Barely in the brain damage, but they were in the brain damage range which yielded an impairment index which is

kind of an average of all those scores of 110. Anything above point five is considered brain damage. So, I think there is some brain damage in Joe Nixon.

Q Doctor, in performing your examinations of Mr. Nixon, did you have certain information that – did I supply you with some documents?

A Yes.

Q You have a copy of his recorded statement that he had given the Sheriff's Department.

A Yes.

Q And did you have a taped statement in deposition of Willie James Harris? Do you recall?

A Who is that? The name slips my –

Q To refresh you recollection, I believe he's the gentlemen that rode with Mr. Nixon in the car subsequent to the killing of Ms. Bickner?

A Nicknamed Tiny?

Q Tiny Harris.

A Yes.

Q Did you have copies of the report and deposition of Major Larry Campbell?

A Yes.

Q Did you have copies of statements and [820] depositions of John Daniel Nixon and Wanda Robinson?

A Yes, sir.

Q Did you also have various presentence investigative reports, psychological screening reports and documents from institutions, for lack of a better way to say it?

A Yes.

Q Did they assist you in your examination of Mr. Nixon?

A Yes.

Q Did you come to any conclusions about Mr. Nixon before you had thoroughly reviewed that information?

A I received that information after my first examination of Mr. Nixon. By that point, I had reached some ideas about his functioning. Even then I felt like there was some degree of brain impairment. After looking over that data, it certainly helped me reach some conclusions about his personality functioning.

Q You reviewed all those documents and spent all the time with Mr. Nixon before you wrote your report?

A Certainly.

Q Explain that personality situation, if you would, to the jury.

[821]A My final diagnosis on Joe Elton Nixon was a mixed personality disorder with elements of antisocial personality, borderline personality and narcissistic personalities. That's from the diagnostic and statistical manual which is a reference book of diagnoses that are currently accepted in psychiatry and psychological [sic].

Some of the key points in the personality diagnosis are the fact that his IQ is in the borderline range. He's not going to be very good at problems solving. He's going to have difficulty in problem solving in novel situations.

His primary mode in dealing with interpersonal conflict between two people is to immediately start plotting revenge. The Rorschach examination which is a projected personality test indicated that under normal situations he does have adequate reality contact.

I don't think he's psychotic. However, when he's put under a lot of stress, he has the capacity to break down and not perceive reality as the rest of us do. In addition, I gave him the Minnesota Multiphasic Personality Inventory and the Milan Clinical Multiaxial Inventory, both of which are true/false self-reported personality inventories. And both of them indicated the [822] personality disturbance as I talked about before and some question of his ability to accurately perceive reality when he's under stress.

Q Your conclusions about Mr. Nixon are not pretty, are they, in terms of being very helpful to his cause, so to speak? You find him to be an unremorseful person.

A Precisely.

Q You find him to be a person who, while not psychotic is what? Not normal?

A Not normal in several senses. His IQ puts him at the fifth percentile as compared to the population at large. The spotty diffuse brain damage, I think, was indicated by the Halsted-Reitan battery probably limits his ability to problem solve to adjust to new situations, plus he has the personality disturbance.

Q Is any of this treatable?

A I don't have much hope for remediation with Joe Elton Nixon. The data you furnished me with, his long history prior to this event indicates that many people have tried to work with him in various juvenile settings and without much success.

Q You would conclude that he's a dangerous person?

[823]A Yes.

Q That he should never be in free society.

A Yes, that's correct.

Q Do you have a thought or an opinion about when these crimes were committed whether Mr. Nixon was under some form of disturbance emotionally or whether he could conform his conduct to the requirements of law to appreciate the conduct, not in the psychotic sense, but in a less restrictive sort of sense?

A I think at the time the event occurred, Joe Elton Nixon was under a tremendous amount of stress. His brother, who in an earlier interview, mentioned that he was closest to his brother of anyone. Wanda Robinson, whom he in his own way loved and still claims to love, had dropped him for John.

This was very stressful. He was drinking some in the days prior to the crime. He had gone without sleep. I think he was under a great deal of stress, a great deal of stress.

Q That could have affected this situation possibly?

A It could have affected his situation – it could affect any of us. I think it particularly affected Joe Elton Nixon

because of his IQ, because of the suspected brain damage, because of his long history [824] of incarceration. He doesn't have the cognitive wherewithal that the rest of us do.

Q Cognitive withwhereall [sic]. In common terms, explain in common terms what you think his situation is.

A I think when he runs in to a situation that's stressful that doesn't make sense, that there are no obvious ways out of it or obvious solutions, he doesn't come up with the right answers. He starts thinking revenge. He starts thinking: I'll act out physically. He doesn't reason things through like a normal adult human being. That's what I mean by that.

Q In your report, you seem to think that perhaps Jeanne Bickner's death could have been a form of misdirected rage at the situation that he found himself in at the time in reference to Mr. Nixon?

A Yes.

Q Is that possible?

A That's my hypothesis that's based on inference. There's no way to ever know exactly what was going through Joe Elton Nixon's mind at that moment or when he was at Governor's Square Mall, but that's my best hypothesis.

That's based on – one of the techniques I used with him was to ask him about his earliest recollections which is a projective technique meaning [825] that the data I get from that, I don't interpret literally because all of our memories of past events are distorted by where we're at today.

His recollection of past events – three of the first recollections he gave me were recollections of seeking revenge

to people that had mistreated him. I think revenge is a primary fact in the way he operates.

MR. CORIN: Thank you, Doctor.

CROSS EXAMINATION

BY MR. GUARISCO:

Q You believe in capital punishment, Doctor?

A Yes, I do.

Q Now, you were told about the Defendant's extensive use of alcohol, drugs, told about his lack of sleep, told about his love spat?

A Could you repeat that.

Q His love spat with his girlfriend. Who told you this?

A Joe Elton Nixon.

Q He told you that. Did you believe him?

A Yes.

Q You believed him when he told you he drank a lot of alcohol and used drugs. Did you confirm what he told you?

[826]A I didn't interview anyone that lived with him that could verify that, no, sir.

Q So, you took hook, line and sinker what he told you?

A I believed him, yes.

Q Have you ever had anybody tell you a lie that you were examining?

A Yes.

Q You think that's a possibility here with Mr. Nixon that he could have told you a lie about his drug usage?

A It could be possible, yes.

Q During your evaluation of Mr. Nixon, did you read the police reports?

A Yes, sir.

Q Also, I believe you stated that you read the reports that Mr. Corin submitted to you from the various institutions that Mr. Nixon had been in.

A Yes.

Q Do you recall reading comments in these reports that Mr. Nixon was very manipulative?

A Yes.

Q That he could turn it on and off like a light switch?

A I don't remember that exact statement.

[827]Q But he knew how to play the game?

A He had been incarcerated long enough to learn the rules, yes.

Q Now, according to the observations in your report, you found Mr. Nixon to be alert, oriented and cooperative; is that correct?

A Yes.

Q In fact, you found that there was no bizarre or delusional material surfacing during your evaluation; is that correct?

A That's correct.

Q In fact, you also stated in your report that Mr. Nixon demonstrated the capacity for adequate reality contact; is that correct?

A Under unstressful situations, situations devoid of emotion.

Q You also mentioned in your report that he was not guided by voices or in any way responding to visual or auditory hallucinations; is that correct?

A That's correct.

Q Now, I noticed in your report, Doctor, that you questioned the validity of the MMPI, is that correct, that you gave Mr. Nixon?

A That's correct. There is some data that says, though, when the validity scale is elevated and [828] the scale eight and scale six, which are either scales, elevated that you can still interpret it with some caution.

Q But you still questioned his [sic] validity?

A Yes.

Q How would you had classify a person with a total IQ of 88?

A 88?

Q Yes, sir?

A Low average.

Q Average?

A Low average. That's a different group.

Q You mentioned that Mr. Nixon was antisocial. What does that mean?

A Several things. Antisocial personalities generally behave in this fashion. They want what they want when they want it. They have the inability to delay gratification. They frequently don't respond well to authority figures, and there seems to be a lack of ability to plan ahead.

Q In fact, would it be safe to say that the great majority of the people in prison and on death row could be classified as antisocial personalities.

A I have no information about that.

Q You have not read information in your [829] studies?

A I don't know what the research says on that, no.

Q You have not done any research on that?

A I've done research, but I haven't done research on how many prisoners on death row have antisocial personality

characteristics. I know that many people that are incarcerated are antisocial personality disorder.

Q So, you might think then that there's a lot of people on death row that may not be antisocial personality disorders?

A I don't know. I haven't read on [sic] anything on it.

Q Well, would you be safe to say that a majority of the criminals have antisocial personalities?

A Many criminals do.

Q Now, you stated during your testimony that you think that there is brain damage. Now, are you positive?

A Psychological testing, neuropsychological testing is based on inference. I didn't remove his skull and look at his brain either microscopically or microscopically [sic].

Q What you are telling us is that a lot of [830] these tests deal in probabilities?

A I state that in my report, yes.

Q You are not a medical doctor; is that correct?

A No, sir, I'm a psychologist.

Q You know Dr. Ekwall?

A Yes.

Q Are you aware of the fact that Doctor Ekwall didn't find any brain damage?

A I believe the instrument he used is based on inference at [sic] well.

Q The electroencephalograph?

A Right.

Q Now, you stated that Mr. Nixon is not treatable; is that correct?

A In my opinion, he probably is not treatable. Yes, that's correct.

Q So, he's going to be a problem from here on out. Would that be safe to say?

A That's a possibility.

Q He's going to be a problem n prison and out of prison; is that correct? Would that be safe to say?

A I would like to qualify that. I think in [831] prison from the testing I did with him, he does better in structured situations. I think he's going to be less of that problem in prison then he would be in free society.

Q Did you read those reports closely that showed that he was a disciplinary problem in the institutions that he was in?

A Disciplinary problems in prison are a lot less than his behavior outside prison.

Q You say that he is a dangerous person; is that correct?

A I would agree with that.

Q And he's going to continue to be a dangerous person; is that correct?

A Quite possibly.

Q The bottom line of your testimony, Doctor, or your opinion in your report is that Joe Nixon murdered Jeanne Bickner because he was mad at this girlfriend; is that correct?

A Enraged at her, yes.

MR. GUARISCO: No further questions.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. CORIN:

Q Doctor, that's one of the last lines of your [832] report. That's not necessarily your final conclusion. You would just be speculating that that could be an explanation for it; is that correct?

A That was my hypothesis regarding the dynamics of why.

Q In looking for an explanation for the death of Jeanne Bickner, that's a possible explanation; not an absolute explanation but a possible explanation?

A I think there are many precursors to that behavior besides the revenge.

Q In your opinion, did he fake or somehow manipulate the testing which led you to conclude that he had a brain impairment?

A I talked with him prior to the examination. I explained that I was doing this for the Public Defender's Office. He appeared qualitatively to work diligently throughout the exam, was well motivated and cooperative. Seemed frustrated by his failures. I think he put forth a sustained effort.

Q Did I ever ask you in discussions I've had with you to come to any kind of conclusion about Mr. Nixon?

A No.

Q To just do the best job you could in writing your report.

[833]A Right. And the [sic] be unbiased. I think that's reflected in the report.

Q You say some pretty ugly things in there about Mr. Nixon, don't you. Well –

A There are some things in there that might be detrimental to his defense, yes.

Q Mr. Guarisco asked you if you believed in capital punishment. You said you did. You think it should be applied to Mr. Nixon?

MR. GUARISCO: I'm going to object to that, Your Honor. That's not appropriate for this witness to answer.

THE COURT: Approach the Bench, gentlemen.

(WHEREUPON, A BENCH CONFERENCE WAS HELD AND THE FOLLOWING PROCEEDINGS HAD.)

THE COURT: We do have a problem. You have introduced that evidence into the case. You cannot open the

door. Having gone in that direction, he's entitled to inquire as to whether he has any inhibitions, you know, or whether are his thoughts about the death penalty or lack of thoughts about the death penalty had any effect at all on his opinions or its weight.

MR. GUARISCO: I'll withdraw the objection.

(END OF BENCH CONFERENCE.)

[834]THE COURT: Let the record reflect the objection is withdrawn.

BY MR. CORIN:

Q Doctor, I believe my last inquiry and question of you was: Do you believe the death penalty should be applied to Mr. Nixon? Do you have an opinion on that?

A My feeling, my opinion, about capital punishment is that it's appropriate if the perpetrator of such a crime is an intact human being. And I don't think Joe Elton Nixon is.

Q He's not intact?

A No, sir.

MR. CORIN: Thank you, sir.

THE COURT: Recross.

MR. GUARISCO: No cross.

THE COURT: You may step down.

THE COURT: Mr. Corin.

MR. CORIN: Your Honor, we have no further witnesses nor exhibits at this time.

THE COURT: The State has the opportunity of rebuttal. You wish to review notes an [sic] talk to Mr. Hankinson?

MR. GUARISCO: Yes.

THE COURT: In that event, we'll take a break [835] at this point. 15 minute, ladies and gentlemen of the jury. Mr. Hankinson and Mr. Guarisco confer.

The State has the opportunity to present rebuttal evidence at this point, should they so desire to do that. And prudent talking dictates that attorneys talk with each other before announcing what they will do. So, we'll take a break at this point.

(BRIEF RECESS.)

THE COURT: Mr. Guarisco, I understand you wish to present two rebuttal witnesses.

MR. GUARISCO; That's correct, Your Honor.

THE COURT: Let's bring in the jury.

(WHEREUPON, THE JURY WAS BROUGHT IN THE COURTROOM.)

THE COURT: We'll move to rebuttal evidence presented by the State.

* * * * *

Whereupon,

ROY MCKAY

was called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q Would you please state your name for the record, please.

[836]A Roy Captain McKay.

Q And what is your occupation?

A Assistant superintendent for the Dozier School for Boys in Marianna.

Q And how long have you been there?

A Twenty-four and a half years.

Q Can you tell us a little bit about your educational background?

A Yes, I'm a special education major and education teacher, and I have for lacking 12 hours of having a Master's Degree.

Q In psychology?

A Yes.

Q While you were employed at Dozier School, did you have occasion to come in contact with Joe Elton Nixon?

A Yes, I did.

Q Do you recall approximately when that was?

A The first was in 1972, and the last time in 1976.

Q I show you what's been marked and introduced as Defense Exhibit 1. Can you recognize the individual in this exhibit.

A Yes.

Q Is that the Joe Nixon that you knew?

[837]A Yes, it is.

Q Did you have a lot of contact with Joe Nixon while he was in school? Dozier School?

A On the last commitment, I had a greet [sic] deal of contact with Joe.

Q Do you what know [sic] Joe Nixon's IQ was back then?

A Would you repeat the question?

Q Do you know what Joe Nixon's IQ was?

A Yes.

Q What was that?

A Eighty-eight.

Q And how did that compare with the average in the school?

A It was a little above average. The average IQ at the institution at that time was 84.

Q From your observations and dealings with Joe Nixon while he was in Dozier School, do you have an opinion as to whether or not he knew right from wrong?

A Yes, he knew right from wrong.

Q Again, sir, based on your observations of Joe Nixon while he was in Dozier School, would you have considered him or did you consider him back then a manipulative person?

A Very much so. To the point that we were [838] concerned about his release.

Q He knew how to play the game?

A Yes.

Q And he knew how far he could push?

A That is correct, because he knew exactly where the gray line was, and he would not cross that line.

MR. GUARISCO: Thank you. No further questions.

THE COURT: Any cross examination, Mr. Corin?

MR. CORIN: No, sir.

THE COURT: You may step down.

MR. HANKINSON: We would call Major Larry Campbell.

THE COURT: Major Campbell was previously sworn and remains under that oath.

* * * * *

Whereupon,

LARRY CAMPBELL

was called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HANKINSON:

Q For the record, would you state your name [839] again please, sir.

A Larry Campbell.

Q And I believe you testified earlier that you are second in command at the Sheriff's Department?

A That's correct, sir.

Q And I also believe you earlier testified that on the 14th of August, 1984, you had transported the Defendant in this case, Mr. Nixon, from 910 Millard Street to the Sheriff's Department?

A Yes, I did.

Q During that trip from Millard Street residence to the Sheriff's Department, did you have any discussion with Mr. Nixon about a pending criminal matter?

A I did, sir.

Q And how did that come up?

A As I was explaining Joe Nixon's rights to him on the 13th, I was going into detail on his rights. I made a statement to him, "Joe, you've been down the road before. You know what I'm saying to you, don't you?"

He said, "Yes, sir, I do." I asked him at that time I said, "You've got something coming up now, don't you, or you've got something in the works at this time, don't you?"

A He said, "Yes, sir, I do."

[840]Q And go ahead. What discussion did you have about it from that point on?

A I asked him, "Well, what is it?" He said, "It's a little thing coming up. I'm probably going to get some probation or two weeks or ten days."

Q I said, "That's before Judge Miner, isn't it?"

A He said, "Yes, sir." I said, "Well, Judge Miner is a pretty hard judge, isn't he? He don't usually give people ten-day sentences." He said, "Yes, but that's all I'm going to get out of the [sic] it."

Q [sic] I said, "You and Judge Miner must be mighty tight." He said, "Well, that's all I'm going to get."

Q What was the tone of the conversation as you were discussing it?

A Very casual, laid back.

Q Now, on a different subject, have you had the experience through the years of law enforcement that you've been in of noting the signs and effects of alcohol and drugs?

A I have, sir.

Q And would you relate to us what experience you've had in that, please, sir.

A I've been qualified to testify in courts in Florida and, I believe, Federal Court also as an expert [841] in the field of narcotics since 1965. I was an undercover agent actively working drug cases for approximately 12 years. I've been supervising the working of drug cases for I don't know how many years.

Q And specifically, are you familiar with the effects on individuals of alcohol, marijuana, and cocaine?

A I am, sir.

Q On August 14 of '84, about how long were you with the Defendant in this case, Mr. Nixon?

A Probably around three hours.

Q Did you note any signs that Mr. Nixon had been using or was under the influence of alcohol, marijuana or cocaine?

A No, sir, I did not. I observed Mr. Nixon rather closely in that regard to making an evaluation myself and also questioned him about it.

Q And what did you observe?

A Joe did not have any of the symptoms or visual symptoms associated with drug use. There was no odor of any, say, the use of marijuana or incense or something of that nature about his person. There was no drugs on him when I arrested him.

The pupils in his eyes were not dilated. He was not on – as I refer to the nod which would be [842] common for somebody that was using an opium-type drug, nor was he speeding, something that was using like an amphetamine drug or drug such as codeine or cocaine. Alcohol was not on his breath.

He had no redness of his eyes or such as. His speech was well within the limits for him. He was not slurring his words any more than normal conversation. He was fully aware of everything that was being said to him and was answering in a conversant manner.

He was not making any complaints of any physical problems other than being sleepy to some extent. He yawned a number of times while we were conversing. He did not speed or did not talk in such a fast manner or jump from subject to subject or make fast movements or things that would be normally associated with somebody that was under the influence of a stimulant-type drug.

MR. HANKINSON: Thank you.

THE COURT: Mr. Corin.

MR. CORIN: No, sir. No questions.

THE COURT: You may step down.

MR. HANKINSON: We have no further testimony to present, Your Honor.

THE COURT: That concludes the evidentiary [843] phase?

MR. CORIN: Yes, Your Honor it does.

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[1004] THE COURT: We're in the closing argument stage, now, of the penalty phase of the proceedings. Under those procedures, we will hear first from the State, to be followed by the defense.

Mr. Guarisco, for the prosecution, will present that argument.

Mr. Guarisco, you may proceed.

MR. GUARISCO: Thank you, Your Honor.

[1005] Ladies and gentlemen of the Jury, again, on behalf of the State of Florida, I would like to thank you for your patience and for your careful attention during this trial, and your willingness to serve.

This is a difficult task for everybody. No one enjoys the decision that has to be made today. I do not take pleasure in asking for the death penalty. But the law does provide for the death penalty in proper cases, where aggravating circumstances are established.

Everyone on this jury agreed to follow the law. Everyone on this jury agreed that they could vote to recommend the death penalty in a proper case.

This is a proper one for the recommendation from you for the death penalty. The facts presented in this case establish enough of the legal requirements for a recommendation by you that the death penalty be imposed.

Before the State of Florida gets into a discussion of aggravating circumstances, let's take a look at what the defense has placed in mitigation. Let's analyze what has been presented in mitigation.

What did Betty Nixon say? Really, not much of anything. He had problems in school, he had problems with the law. No one doubts that. No one questions [1006] that.

Mr. Corin introduced documents that will show you that the defendant, Joe Nixon, is a habitual criminal. She did say that Joe Nixon had emotional and mental problems growing up.

Now, if you look at some of the documents that the defense has introduced into evidence, you will see statements in the reports that Betty Nixon said, to her knowledge, Joe did not have any psychological or psychiatric problems.

These are reports that probably deal with him back when he was in the youth schools that he attended or that he was placed in.

So, in essence, she kind of contradicted herself.

Now, Wanda Robinson testifies that on two occasions, she had problems with the defendant. Once on Macomb Street, and another time at 910 Millard Street, which was her residence; that the defendant tried to hurt her, that she was frightened of him. Yet, she testifies on the witness stand that she still loves the person that frightens her.

Now, Deputy Bevis, who is also a defense witness, contradicts Wanda Robinson. He was one of the deputies who responded to 910 Millard Street when [1007] Wanda and the defendant were supposedly having a disturbance.

Now, when he go there, there was no disturbance, no laws were being broken, no signs that any law had been broken. The defendant was fine. The defendant was not upset. The defendant was calm. There were no signs that the defendant was under any emotional duress or distress. The defendant didn't say anything about wanting to hurt someone. All the defendant wanted to do was get a ride back to town. And when Deputy Bevis and the other deputy consulted with Wanda Robinson, she agreed to take care of that problem for the defendant.

Now, does that sound like a disturbance?

Officer Eldridge then testified for the defense that he witnessed Wanda Robinson and the defendant having an argument on Macomb Street, that escalated momentarily. On his observations, it seemed to him that Wanda was causing most of the problems.

Now, the defendant did strike her, he was arrested on a misdemeanor battery charge, taken to the station and released, as the officer said, because the criteria was met for his release.

He did state that after the incident had escalated, the defendant did calm down. And he also [1008] said that this kind of incident was not unusual for that area.

Officer Eldridge said that at the station, the defendant apologized to him, he was calm, he was rational, he was not under any emotional distress; and that when the defendant left the station, he was calm, he was rational, he was not upset.

All this supposedly occurred around the week prior to this murder, or a few days prior to this murder.

When Mr. Corin stated in his opening argument that the defendant had been drinking and was using drugs and was out of control, this is the time period that we're talking about. And the facts that he presented didn't show that.

Nothing in the testimony put on by the defense, so far, supports their theory that the defendant was under the influence of drugs or alcohol and having conflicts with his girl friend.

Now, Doctor Ekwall was not helpful to the defense's theory, if you recall his testimony. He was unsure of what the problems were. He said his opinion as to the defendant's mental condition at the time of the murder was not firm. He really didn't know what was going on. He said the defendant was within normal [1009] limits, though, in his neurological examination. There was no evidence of neurological disease or damage. He said the defendant was sufficiently free of mental defect, disease or derangement and competent to stand trial. He said the defendant was responsible for his actions. He said that the defendant knew the criminality of his acts at the time of the murder. He said the defendant was not psychotic. He agreed that the defendant was a manipulative person.

The parts of Doctor Ekwall's findings regarding the defendant's use of alcohol, drugs, and his lack of sleep, and the defendant's frustration over his girl friend came from the defendant, himself, whom Doctor Ekwall says has a tendency to lie and fabricate.

Doctor Ekwall hypothesized, based on what he was told by the defendant.

Now, are you going to take the doctors' speculation, or are you going to rely on the facts that were presented at trial and incorporated in this proceeding for your decision?

Doctor Doerman also was not helpful to the defense in advancing the defense's theory in mitigation.

He contradicted Doctor Ekwall about whether or not the defendant had brain damage. Doctor Ekwall, in [1010] essence, said that there was no sign of brain damage. Yet, Doctor Doerman says, from his testing, there were signs of brain damage. However, he went on to say that in his testing he was dealing with probabilities and that he could not be positive.

He did call the defendant a dangerous person. Doctor Doerman did say that the defendant could be manipulative, the defendant was not remorseful for what he did, that during his testing the defendant seemed to be alert, oriented, cooperative, he was not bizarre, he was not delusional.

Now, I'm not going to stand here and tell you that the defendant is the everyday normal citizen. Anybody who commits murder is not the everyday normal citizen.

But the defendant knew exactly what he had to do, how he was doing [sic] to do it, and that he had to destroy the evidence.

The bottom line is that the defendant is just pure mean. And no prison is going to help him.

Now, Doctor Doerman did try to tell you what you should recommend.

This decision as to whether or not the defendant gets the death penalty or life imprisonment is up to you. You know more of the facts than [1011] Doctor Doerman does.

Now, the defense introduced somewhere around 50 documents into evidence.

You should examine some of these documents. Because an examination of these documents will reflect that the defendant was manipulative, that he knew how to play the game, he knew the proper answers, he could turn it on and off like a light switch, that the defendant knew right from wrong, that the defendant had admitted that he did not use drugs; and then, on occasions, admitted moderate use; and that he drank occasionally.

An adult prison reception center said that the defendant had no psychiatric problems. The defendant was not psychotic. The defendant had the ability to handle frustrations within normal range. That the defendant had the ability to handle problems. That the defendant had an average IQ, contrary to what Doctor Doerman says.

A lot of what is in the documents that the defense introduced contradicts their theory on mitigation.

Now, of course, Mr. Corin stated in his opening statement that the defendant - and he's going to show that the defendant had a life of many problems and [1012] that no one could help and that everyone failed.

A review of these documents will show you that the institutions that he was in, and the various boys' camps that he went to, did all within their power to help him. But he refused to cooperate. And you'll see, as he grew into adulthood, that he refused to cooperate, that he was a discipline problem, that he's a habitual criminal, that he is dangerous. And he always will be a danger.

The facts that the defendant was under the influence of drugs and alcohol, and hadn't had any sleep prior to the murder, and that he was having problems with his girl friend, that he was

frustrated over his relationship with his girl friend, came from him. And he told the doctors because he wanted the doctors to have that information to come and testify here today, or during this proceeding.

Now, Major Campbell, in rebuttal, came on. And he's an experienced law enforcement officer. And he was an expert, qualified as an expert in narcotics investigations.

He stated that when he brought the defendant in and he spent that time with the defendant, taking the statement, that there were no signs, in his opinion, that he was under the influence of alcohol. [1013] There were no signs that the defendant was under the influence of drugs, based on his observations. And he detailed his reasons.

You also should remember, in the defendant's statement, the recorded statement, he was asked the question; and in his statement, he said he had not used any alcohol.

Also in rebuttal, we put on Mr. McKay, who knew the defendant back when the defendant was in the Dozier Boys School. Had a lot of contact with him. He said that the defendant was manipulative, knew how to play the game, knew where the fine line was, knew right from wrong. And he had an IQ of 88, which was above average for that school, which contradicts what Doctor Doerman says.

So when you examine the evidence presented by the defense in the penalty phase, you will clearly see that there is no mitigation that would justify the recommendation of life imprisonment.

Now, let's look and examine the aggravating circumstances.

The great majority of the facts that apply to these aggravating circumstances that I'm going to mention have already been proven beyond and to the exclusion of every reasonable doubt. And you found so [1014] by returning the verdict of guilty as charged on all charges.

So we have proven these aggravating circumstances, or the State of Florida has, by evidence beyond and to the exclusion of every reasonable doubt.

The first aggravating circumstance is that the defendant was previously convicted of a felony involving the use or threat of violence to the person.

Well, the State of Florida introduced certified copies of his previous convictions for armed robbery and battery on a law enforcement officer.

You will hear an instruction that tell you that these crimes are felonies involving the use or threat of violence to the person. This is a matter of record, now. This is proven to you.

Aggravating circumstance number two: The capital felony of murder of Jeanne Bickner was committed while the defendant was engaged in the commission of a kidnapping. This has been proven to you beyond a reasonable doubt. He abducted Jeanne Bickner from the Governor's Square Mall parking area; he beat her, he threw her in the trunk of the car, he drove her to a remote wooded area off Tram Road and he murdered her. That aggravating circumstance has been proven to you beyond a reasonable doubt. [1015] You found him guilty of kidnapping.

Aggravating circumstance number three: The capital felony, the murder. The capital felony was committed for the purpose of pecuniary gain.

By your verdict of finding the defendant guilty of robbery, you have found that the state has proven that aggravating circumstance.

The defendant's initial intent was to steal the automobile of Jeanne Bickner. And then he stole her rings and her money.

The defendant liked this automobile; he had his eye on this automobile, he singled her out. He liked the automobile because, the evidence reflects, he drove all over town, showing everybody this automobile. He tried to sell this automobile. The defendant pawned the two rings that he took from the victim.

Aggravating circumstance number four, that has been proven beyond a reasonable doubt: capital felony; the murder of Jeanne Bicker was especially heinous, atrocious and cruel. The manner in which the defendant murdered Jeanne Bickner was wicked, evil and outrageous. Jeanne Bickner was in cognition of impending death. She knew that the defendant was going to kill her. She was helpless. She had no control over her life. The defendant had control over her life. And he [1016] showed no mercy. She suffered great mental anguish, anticipating the moment of her death. She was beaten, she was locked in a trunk, she was driven to that remote wooded area in the middle of nowhere, where nobody could intervene to help her. She was tied to a tree. She was told she was going to die. She was choked. She gasped for air. She was subjected to a painful, horrible death, by being burned alive.

And prior to her death, her panties were taken from her. And why did the defendant say he took her panties? To terrorize her.

Prior to her death, she begged and begged and begged that her life be spared.

All of these facts have been proven to you beyond a reasonable doubt.

Aggravating circumstance number five, that's been proven to you beyond a reasonable doubt: that the capital felony, the murder of Jeanne Bickner, was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification.

This aggravating circumstance has been proven to you beyond and to the exclusion of every reasonable doubt. Clearly, there was no moral or legal justification for the defendant taking the life of Jeanne [1017] Bickner.

The defendant killed Jeanne Bickner in a cold, calculated and premeditated manner. He singled Jeanne Bickner out. He abducted Jeanne Bickner. He took her to a remote wooded area. Took time with her and talked with her.

She told him that she was a Christian. He told her about his past life or being in prison. And it was during this time prior to her murder that he realized that he would have to kill her because she would be a witness against him and could send him away to a place that he did not like, prison.

He deliberately prepared to kill her. He tied her up to a tree. He put a bag over her head. He took the contents our of her car and set them on fire, and then he threw the cover that was on the car on the ground so that it would heat up. He choked her. Then he took that cover that was heated up and threw it on top of her so that she could burn alive.

Then he burned the contents – He burned the contents of her purse. Then he burned his clothes because he thought there was blood on them.

When he could not sell Jeanne Bickner's car, he decided to burn it because he felt his prints were on the car and he felt that the fire would destroy the [1018] prints.

These last three things that I've mentioned about what he did, of course, goes to the fact that he was destroying the evidence.

This case has been the story of the death of Jeanne Bickner. It's been a horror story, demonstrating the terror that she went through and how she begged and pleaded for her life. And the defendant showed her no mercy.

And, now, the defense wants you to show the defendant mercy. Why should the defendant be shown mercy? There is a valid reason to show mercy. There is no valid reason to give him a break. There is no valid reason to reward him.

Don't let this happen. The State of Florida has proven to you sufficient aggravating circumstances to warrant the imposition of the death penalty. And the State of Florida asks you at this time to recommend the death penalty to the Judge.

Thank you.

THE COURT: Mr. Corin, to close for the defense.

MR. CORIN: Thank you, Your Honor.

Good morning. I will ask you to do this as I talk to you about this case. I hope to be able to respond to some points that Mr. Guarisco made. But [1019] I think they will be tied in with some other things that I would like to tell you.

The first thing that's on my mind: Everybody in the courtroom has got something they have to do. Each one of us has a job that we have to perform.

The fact that I represent Joe Elton Nixon does not mean that I don't have normal human feelings, and it doesn't mean that I am not as upset by the evidence that you've been exposed to, as you have been. Tears flow on both sides of that rail for a human being. All life is precious. The fact that she's no longer with us, to share in the joys of her friends and relatives, to share the pain they have, is equally painful for all of us. And nothing, nothing can ever repay that.

You might say, "Well, that's kind of weird for Corin to seem to be upset about that."

Well, that's the way it is. And let me tell you a little bit about why we are here today, in terms of what capital punishment is all about.

We've had capital punishment in this country, in various states, for as long as we've been around.

Back in 1972, the United States Supreme Court said we couldn't have it any more. Those of you that believe in capital punishment, you just haven't been [1020] doing it right, folks. It was freakish and randomly applied. There were racial motivations. There were perhaps statistics that showed that some people had been treated unfairly in the application of capital punishment as we knew it 13 years ago. So they threw it out.

And there were perhaps 100 people on Death Row in Florida at that time, and they pretty much all received automatic life sentences, no matter what horrible things they had been convicted of.

Well, the State's response, at least Florida and many other states, to that action of the U.S. Supreme Court was to convene a meeting in Oklahoma City, back, I think, in the early fall of 1972, and many, many, attorneys from the various

Attorney General offices throughout the country gathered in there and they respond, "How can we start this killing process, this capital punishment, up again? What is it that the United States Supreme Court said was so unfair that they had to throw the whole thing out?"

Well, there were two schools of thought on that. One school said, "Well, gee, the problem with capital punishment is that people treat it unfairly."

That is, you may do something, and I may do something, and one of us gets a certain sentence and [1021] one of us does not. I could be sexually motivated, racially motivated or economically motivated.

"So what we need to do is, anybody that does a murder, we kill them. That would make it fair, wouldn't it?"

There was another school of thought, which ultimately prevailed in Florida, that, "No, that's not the proper response. You don't take the life of all human beings who took the life of someone else, because that only looks at the aspects of the offense, and not the aspects concerning the offender."

So Florida opted for the system that the Judge has advised you of and the procedures that we're going through today. That is, you have guidance for your deliberations. There are aggravating factors and there are mitigating factors, to give society a control, so that all who do certain things aren't treated the same way. It's not proper, as the courts have now ruled. That's why we have various arguments.

The attorneys for the State, their function is to present the facts of the crime to you, and to focus your attention on the crime. That's their job.

My job? In fact, I consider it a privilege and honor to be involved in a system where we can have two sides to the story. But a lot of people don't like my [1022] side because what I have to do is present the side of the accused. In fact, he's not accused any more; he's convicted. He's four times convicted by y'all.

That's my job. And that's why we are about this business today.

Regardless of your beliefs about the death penalty, I think all of you told me during your voir dire that there were certain offenses that automatically the person should be executed for, and some, and you thought not. And the Judge questioned you about it and you indicated that you would abide by the Court's instructions and you would consider all the aggravating and all the mitigating circumstances. And that's what we are doing here today.

Now, the Judge is going to give you instructions about the aggravating circumstances, he's going to give you instructions about mitigating circumstances.

Mitigating circumstances are unlimited. Unlimited. So if I don't bring to your attention all of them with what I think are somewhat mitigating circumstances, then perhaps you have thought of others. And these, whatever they are, don't have to be proven beyond a reasonable doubt. You only have to be reasonably convinced of their existence. And if you [1023] are, then it is very proper and in accordance with your duty that you should find that they exist, and you will consider those in light of any aggravating circumstances that you will consider.

But there is a different standard. And if you are reasonably certain that they exist, then they do exist and you should consider them.

Intelligence. IQ. You've had conflicting testimony. I think that's actually a mitigating circumstance.

Doctor Doerman, I think, testified that his testings revealed a 74 IQ, borderline intelligence.

Mr. McKay, it's apparent, was relying on previous recorded records from at least nine years ago, thought the IQ to be about 88.

There is a rational explanation for that potential deterioration. And that is, it's uncontested that sometime during one of his various incarcerations, Mr. Nixon was hit in the head with a pipe. And I think it's pretty obvious that that would not only affect the testing level, but also should be considered with the evidence of brain damage.

Now, I've asked you to do almost an impossible task in assessing –

I called Doctor Ekwall and I called Doctor [1024] Doerman. And Mr. Guarisco is right. There are inconsistencies in what they told you. They couldn't firmly conclude.

Now, if there's evidence that I "hired it done," so to speak, that I tried to get the best of all possible experts to come in here and puff my client, boy, that is just flat not the case. Because if I could have arranged more diverse testimony, I certainly couldn't have called on two doctors to have done it better than they did.

But the question is not whether they disagreed. The question is whether you can be reasonably convinced that some of what they said is proper. And I think you will find that.

Education. Now, you can look at Exhibit No. 28 and you will see that, consistent with the fact that there may be some

intelligence problems, brain damage or dysfunction, you will see that at about age 14 or 15, Joe Elton Nixon was operating educationally at no greater than a third-grade level, and perhaps closer to the first-grade level.

Age 23. That's the man I'm going to ask you to consider now. He's lived what, for all the world, would appear to be a life of crime since he was 10. But I think when you take a look at Defense Exhibit [1025] No. 1, you will see that, in many ways, Joe Elton Nixon never grew up from what he was at that point.

Emotional disturbance or impaired capacity. Now, that may turn you all off by thinking that, well, again, this is something that the shrinks would come in and – "Oh, yeah, well, you know, Joe tells them whatever he wants, and they're going to come to a conclusion that is going to be beneficial to him."

Well, that is absolutely not true. You are going to look at their reports. You can read each and every line. And if Joe Nixon was fabricating a cockamamy story for these doctors to help save his life, he certainly would have expressed some remorse. He certainly would have done something to lead them to believe that he was a worthwhile human being. Which they pretty much conclude he's not.

In terms of the normal society, he's a danger, he should never get out, there can be no control over him. And they're right. They're right. They're absolutely right.

In fact, what else happened in this case? You know, the State wants to have it both ways. And it's probably not correct to say – For instance, we have Major Campbell coming in to rebut the evidence that perhaps Joe Nixon had been using some type of [1026] intoxicating substance - alcohol, drugs or whatever - saying, "Well, gee, when I arrested him on August the 14th, he wasn't inebriated. I smelled no odor of marijuana or other intoxicant. He did appear to be sleepy. And that was

obvious throughout the statement. His eyes were not dilated. And I don't think he was under the influence."

Well, of course, he is going to tell you he is not under the influence. Because if he was under the influence, the Judge probably wouldn't have admitted the statement because, you see, the statement wouldn't have been voluntary.

He's testifying as to what occurred two days after the offense, and not what occurred immediately preceding the offense.

But if you want to adopt the notion that Joe Nixon is a terrible person and didn't want to do anything responsible, then why did he cooperate with the officers? He didn't resist arrest. He was at the home. They came in. He did nothing to harm anybody.

He gave what turns out, when transcribed, to be approximately a 51-page statement, which has some horrible things contained in it. But what else does it have in it? I'll tell you what else it has [1027] contained in it.

If he was such a devious person, with no responsibility – and I think maybe he is, and I'll get back to that in a minute – why did he tell the officer where the scene is; why did he tell the officer where he threw the gas can, and why did he tell them where her keys were to the car, so they could go out and tie him into this horrible deal? Why did he do that?

I suggest that he did that because he's nuts.

Now, that's not a nice thing for a lawyer to say about his client. But I think that's pretty obvious. He is in and out so often that – And he does atrocious things, and then he does other things.

The officer says, "I went out to the house pursuant to this call." Which, when you read – I think it's Exhibit 50 – you'll see he called because he thought he was going to hurt someone.

Well, he didn't. But maybe in his distorted sense of reality, he anticipated that he might. Of course, the officer gets there and he calms the situation down. And there's nothing going on. I don't think he needed a ride to town because it's not really out of town; there's no evidence that he ever went anyplace other than stayed there that night.

And then we have the officer who testified [1028] about the attack on Wanda the day before the death of Jeanne Bickner.

"Oh, it's just another French Town incident."

No, it wasn't just another French Town incident. What's that supposed to mean? Another French Town incident.

Certain people live in certain areas, or happen to be in certain areas. No, I don't think that's right.

He was a wild man. It took two officers, the testimony was, and two civilians, to hold Joe off of Wanda. Now, she wasn't injured. She wasn't injured. And they took her to the police station and said, "That's just another French Town incident and he meets the criteria for release on recognizance."

Now, I mentioned to you in my opening statement that Joe Nixon has slipped through the cracks of our system. And that's one more crack he slipped through. He should have never been released because, as you know, the evidence shows that he was on bail, awaiting sentencing as a habitual offender for the crime of attempted burglary of a dwelling, and he was on 20 years probation for armed robbery out of the State of Georgia.

Now, we've got sophisticated computer equipment. [1029] All they had to do was push a button to find out that Joe Elton Nixon shouldn't have been released.

And I'm not blaming the officer. I'm not blaming the officers. They did what they thought was, in their best judgment, proper.

All I'm saying is, he slipped through, once again, the cracks of the system.

After he was released, he calmed down. He's wild, and then he's calm.

That night, what happened, Wanda testified – and, sure, she loves him – but she testified for the State. And I have no reason to disbelieve the testimony she gave you when she gave you evidence that can put her loved one in the electric chair. I don't disbelieve – I think she told you the truth for both sides.

But what did she tell you? She told us that that Saturday night he was acting crazy, he was hiding behind dope, beer or whatever. She and John, his brother, spent the night in a motel and didn't return home until the next day.

And what happens the next day when she arrives home almost at the same time that Jeanne Bickner is being abducted? She finds crazy notes, bizarre notes. Now, they've disappeared. I wish we had those to show you. But I certainly have no reason to disbelieve her [1030] testimony about that. Of course, that's unrebutted.

He's so cunning? Why did he keep the car? Why did he do all the things that were going to lead everybody to him? Why did he repeatedly confess? If he is so devoid of some responsibility, then why, in his statement, when the officers, knowing – In fact, they were kind of putting him on a little bit

there. They said, "Well, Joe, why don't you tell us who else you told about this?"

And he did, he said, "Well, I have told Wanda and I told John. But I don't want to get them involved."

I don't know. He's somewhat responsible. And then sometimes he's incredibly and terribly irresponsible. He's a murderer.

Lack of remorse. Now, the State makes much of that. And that's in the doctor's report, and you're going to see that. And probably the saddest thing that you'll see in those exhibits, when you look at them – and I hope and trust you will – is that in Doctor Doerman's report, when he questioned Joe Elton Nixon about the death of Jeanne Bickner and he was asked to express his three wishes, Joe says, "Oh, I wish I was free," he said, "I wish I was a boxer," Joe said, "I wish I had a son."

But he never said he wished Ms. Bickner hadn't [1031] died. Now, that's not normal. That's not even close to rational. That is not a conniving person. That's a sick person.

Now, he didn't show up for his trial. He did show up for the first day, and he did show up part of another day. He didn't come in this courtroom when any of the people he knew had been led in to testify. And I don't know whether that's evidence of he didn't want to put them through the confrontation of having to look him in the eye, and, perhaps, the cause of his death. That could be responsible. Or perhaps he is totally unremorseful. That would be irresponsible. I can't explain it.

But what I do think, it's not normal. It's not rational.

His mamma realized he wasn't right, early on.

And Mr. Guarisco indicates, "Well, there's some reports early on that his mom said, 'Well, I didn't think there was any problem.'".

I would be tough for a mother to say, "My kid is weird, my kid is strange, and I have failed as a mother." It would be a terrible, terrible thing for a mother to have to do in front of a crowd. But I do think she told her story here to try to help her son. I think it's pretty obvious that she didn't really want [1032] to come here. She didn't do anything to really hurt or help Joe.

She testified, as a mother, that she did the best she could. But that failed.

And, you know, that's all kind of said. As you'll see from these documents here, she failed with a lot of other children. So perhaps there is some problem there that she couldn't meet, or perhaps some organic problem in the family.

Now, I'm not going to blame society for Joe Elton Nixon. I'm not going to blame institutions. But it's pretty obvious that all the exposure to the various institutions, the homes, church, school, the prisons, the jails, obviously didn't take, for whatever reason. It didn't work.

But as against an argument that all this has been recently fabricated. I'm only sensitive to the death of Jeanne Bickner. It all of a sudden becomes a little bit strange.

I want to read to you just a few excerpts from the documents that you will have an opportunity to see.

1972. Psychiatrist, James Griswold, Dozier School:

> "I have no suggestions for ways of working with him. He seems bewildered and uncertain. [1033] You ought to check out his physiological condition."

1974. Exhibit 7. And these, again, are excerpts. I don't try to mislead you. I want you to read all of them, to give you a clear picture. But it is my turn to make my argument. And I think you need to be aware of certain things.

Doctor Elizabeth Stribling:

"Intellectual functioning below average. Performance on measures of visual retention and perception very poor. I can't rule out physiological condition. A structured environment may be the only way to keep him from being a behavior and management problem.'

1974. Exhibit No. 8:

"– in need of 24-hour supervision."
At that point, he was 13 years old.

Exhibit 12:

"What will happen to your child if not helped at this time?"

"He probably will be institutionalized most of his life."

And, in fact, he really should have been, shouldn't he?

1974. Exhibit 14:

[1034] "Repeated mention of a perceptional problem, not definite enough to have indicated need of neurological testing, but which might point to emotional blocks."

"– little reality in the way he relates cause to

effect."

"– one cannot seem to learn from his mistakes."

Well, that diagnosed Joe Elton Nixon. That was 11 years ago.

Doctor Tom Heiman, a psychologist, was asked to examine Joe Elton Nixon in 1975, because Joe had been acting out. I guess that's a psychological term for being bad, doing something wrong. And he said:

"He begins to tremor and show other unusual emotional responses to corrections. He has not internalized any parental values or restrictions on thought and behavior or ego development."

Job – and you'll see in those documents – is the name his mother gave him. But through the years, he came to be known as Joe Elton. I think it's probably because of a birth certificate foul-up. But he's referred to here as Job. "– will never meet the criterion of a good, well-behaved out-of-sight, out-of-mind adolescent and so we close by just wishing you luck."

Just luck. I don't give you any good thoughts on [1035] how to deal with this. Just good luck.

I'm not blaming anybody. But that's another indication that the system hasn't worked.

1975. "Seriously disturbed in terms of perception and reality."

Exhibit 26. Robert Newkirk, a local counselor.

"In view of the type behavior displayed by this youth, there is substantival doubt as to his soundness."

And I want you to pay attention to Exhibit 31. That is the document from Roy McKay, the man you testified for the State in rebuttal. I want you to read – In that exhibit, he sent a long memorandum, as the Assistant Superintendent of Dozier School, to Lenox Williams, who, at that time, was the Superintendent of Dozier School, detailing Joe Elton Nixon at that time. And that's not consistent with what his testimony was yesterday.

Part of it, he said, he can function under very strict supervision.

March of '76. A letter from William Cummings, a local youth counselor to the institution. It's Exhibit 32.

Now, to give you a bit of background on this:

In 1975, Joe had been released from - I think it [1036] was Camp E-MA-CHAMEE, after a long stay. He had a long stay there. He was only on the street for a short period of time and went out and did some crimes - arson and other terrible things. And they immediately committed him back to the boys' school, to get him out of the community.

When he got to the school, he was working his way through the system again, behaving himself. But it was pretty obvious that he wasn't ready to come out, nor was the community ready to accept him. The letter states, in part, that,

> "Should Job return to this community any time soon and become involved in similar law violations, he will, no doubt, be certified to the adult system, if he is fortunate enough to remain alive."

You will also find, in 1972, that they predicted that not only would he probably not ever be able to remain alive in society, but that other people might be hurt because of him.

So all of this has been predicted, but none of it has been prevented.

But it can be, now.

At the very least, Joe Elton Nixon is presently serving a 13-year prison sentence. If he has your [1037] recommendation and it was honored by Judge Hall to sentence him to life, he would have to do life. I can assure that that would be consecutive to any sentence he is now serving. So it would be another 25 years, then, even if they ever considered him for parole.

But I can safely assure you that the transcript of this trial will go on to other courts, and perhaps will be sent to paroling authorities. And there is no way that Joe Elton Nixon would ever be released from confinement.

You've convicted him of kidnapping, you've convicted him of robbery, and you've convicted him of arson. These are very, very serious felony offenses for which he can be properly, perhaps extensively, sentenced by Judge Hall. And even after age 80, if they thought that it was time that Joe might be released from some form of confinement in Florida, Georgia will come for him and he will have to do 20 years up there.

And you might want to say, well, gee whiz, why should we throw him a bone? Why should we commend life, because all he's ever done is harm other people? He's obviously liable to harm somebody in the prison system.

Well, I would ask you – That is a concern. And sometimes jurors say, "If we give him his life, he might [1038] hurt someone else."

Well, I can't say that he will, and I can't say that he won't. I'm never going to lie to you. All I can do is rely on

records. And if you will review Exhibit No. 38 and 41, 42 and 43, you will see that never in his adult life, while incarcerated in the prison system, has Joe Elton Nixon ever received the first discipline in his report.

I don't know when the death penalty is warranted. But I think there is good evidence before you that – Well, the truth is, I don't think it ever is. But I guess you get that impression. But I don't think it's needed in this case. There are other ways to deal with it. And you can, by your recommendations – and you have by your prior verdict – create the opportunity for forever terminal final confinement for Joe, even though you may not think he is very deserving of that.

Now, today is Thursday. The trial has lasted about a week. All I've ever asked you to do is keep your mind open. I never asked you for anything more than that. And I promised you that I would try not to misrepresent anything to you. And I think I have, to the best of my ability, kept that promise.

I've shown you the good and the bad and the ugly, something that probably no jurors have ever seen in [1039] a case such as this, about a lawyer's client.

You made me promise, too. And you took an oath. That what that promise and that oath said was that you wouldn't decide this case until the proper time, and you wouldn't decide anything until you had reviewed all of the testimony and all of the evidence. And I'm asking you to do that when you retire to deliberate. And it's going to take you some time.

And I run the risk that a majority of you are going to look through those documents, because I trust that none of you have decided what you should recommend, and a majority of you look through those documents and you're going to say, "This man must die, this man must die, because of the horrible things that are contained therein."

But I pray that a majority of you will look at that and say, "This is not a case for the electric chair."

This is going to take some time because those 50 documents are lengthy. But you have the opportunity to do that, and I'm requesting that you do that.

Now, your advisory recommendation to the Judge does not have to be unanimous. He's going to tell you that. Don't be hasty. And even though some of you may have considered what ought to be done with Joe Elton Nixon, [1040] don't be hasty, because one vote could decide that point. It's not a unanimous situation.

If you want to recommend death, you'll have to do it seven to five; and if you want to recommend life, you will have to have six of you to do that.

Of course, I'm afraid that that's what you are going to do.

Doctor Doerman, I – I don't think he tried to tell you yesterday what you should do. I think he was pretty open and honest. And I did ask him, in response to Mr. Guarisco's question about whether he believed in capital punishment – I don't know what the purpose of that question was. But he said, yes, he did, but only for an intact human being.

And Joe Elton Nixon is not one of those. He's never been one of those. He never will be one of those.

You know, we're not around here all that long. And it's rare when we have the opportunity to give or take life. And you have that opportunity to give life. And I'm going to ask you to do that. Thank you.

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324

STATE OF FLORIDA,

vs.

JOE ELTON NIXON,

Defendant.
_____/

ADVISORY VERDICT

A majority of the jury, by a vote of 10-2, advise and recommend to the court that it impose the death penalty upon JOE ELTON NIXON.

SO SAY WE ALL this 25th day of July, A.D., 1985.

/s/
FOREMAN

The jury advises and recommends to the court that it impose a sentence of life imprisonment upon JOE ELTON NIXON without possibility of parole for 25 years.

SO SAY WE ALL this _____ day of July, A.D., 1985.

FOREMAN

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324-CF

STATE OF FLORIDA,

v.

JOE ELTON NIXON,

Defendant.
_____/

MOTION FOR NEW TRIAL

COMES NOW the defendant, JOE ELTON NIXON, through the undersigned attorney and pursuant to Rules 3.590 and 3.600 of the Florida Rules of Criminal Procedure and moves this Court for a new trial in the above-styled cause. As grounds for same, counsel would show as follows:

1. The Court erroneously excused prospective jurors because of their beliefs concerning capital punishment.

2. The Court erred in denying the defendant's motion for addition [sic] peremptory challenges.

3. The Court erred in admitting into evidence, over objection, certain photographs of the victim.

4. The Court erred in overruling the defendant's objection to the instructions given the jury concerning reasonable doubt.

5. The Court erred in failing to grant the defendant's motion for mistrial which was directed toward an improper remark concerning the victim made during the prosecutor's closing argument.

6. The Court erred by refusing to give the defendant's requested penalty phase instruction number 2.

7. The Court erred in admitting, over objection, the testimony of Detective Livings during the penalty phase of the trial.

8. The Court erroneously instructed the jury concerning aggravating circumstances during the penalty phase of the trial.

WHEREFORE, based upon the foregoing, the defendant prays that this Honorable Court will grant a new trial in this cause.

Respectfully submitted,

MICHAEL M. CORIN
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32301
(904) 488-2458

(Certificate of Service omitted in printing)

[Supp. Record on Appeal, Case No. 67,583]

[2] IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

CASE NUMBER: 84-2324

STATE OF FLORIDA,

vs.

JOE ELTON NIXON.

Defendant.
_____/

PROCEEDINGS:	Hearing
BEFORE:	The Honorable J. LEWIS HALL, JR. Circuit Judge
DATE:	December 19, 1988
LOCATION:	Leon County Courthouse Tallahassee, Florida
REPORTED BY:	ARTHUR W. GREEN Official Court Reporter

ARTHUR W. GREEN
Official Court Reporter
Leon County Courthouse
Tallahassee, Florida 32301

[3] APPEARANCES

JAMES HANKINSON, Assistant State Attorney; RAYMOND MARKY, Assistant State Attorney; and ANTHONY GUARISCO, Assistant State Attorney, Leon County Courthouse, Tallahassee, Florida; appeared on behalf of the State of Florida.

T. WHITNEY STRICKLAND, Attorney at Law, 316 Williams Road, Tallahassee, Florida; appeared on behalf of the Defendant.

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[4] PROCEEDINGS

THE COURT: All right. We will proceed with the case of Joe Elton Nixon, Appellant, v. the State of Florida, Appellee, a Supreme Court Case No. 67583.

This matter came back to Court on an initial order of relinquishment of jurisdiction remanding it to the Circuit Court for the purpose of an evidentiary hearing in connection with Mr. Nixon's claim of ineffective assistance of trial counsel.

A review of that order indicated the desirability of perhaps more specificity with respect to the Supreme Court's desires.

It was followed by a subsequent order in which the court clarified its previous order. They say that there needs to be a hearing conducted, and noted that the Appellant, Mr. Nixon, has the burden of establishing the claim of ineffective assistance of counsel.

Mr. Nixon, therefore, would be the proponent of witnesses, with the State having the right to cross-examine those witnesses.

The trial court could make further inquiries that were deemed necessary.

Under that rather encapsulated and general scenario, [5] it would appear Mr. Strickland as counsel for Mr. Nixon you have the burden of proceeding at this point.

Are there any preliminary matters that we need to have clarified or brought up before we proceed?

MR. STRICKLAND: Yes, sir, Your Honor. I would like to interpose an objection for the record. The Appellant, once

again, interposes an objection to these proceedings because they represent an expansion on the scope of the limited issue brought by the Appellant on appeal.

The issue on appeal concerns the issue of record consent pursuant to U.S. v. Cronic. The issue is not ineffective assistance of counsel brought pursuant to Rule 3.850. I would also object on the basis of attorney/client privilege.

If this were a typical ineffective assistance of counsel –

THE COURT: Wait a minute, let me get a clarification. When you say ineffective assistance – the confidential relationship of counsel – I presume you are speaking of the confidentiality of the communication between Mr. Nixon and Mr. Corin, would I be correct in that?

MR. STRICKLAND: That is correct.

[6] THE COURT: And maybe in some degree the confidentiality of communication between Mr. Nixon and you.

MR. STRICKLAND: That is correct, Your Honor.

Your Honor, if this were the typical 3.850 ineffective assistance of counsel issue, it would be appropriate for capital collateral relief to be proceeding with this and it would not be limited for the purpose you have just noted.

Accordingly, having so objected, as we have objected, we would reiterate now objections that we have made both to the appellate court and to this court at various previous hearings.

I would note for the record that we are here specifically pursuant to two orders of the Florida Supreme Court dated October 20th, 1987 and dated October 4th, 1988.

We view those orders as directing a limited inquiry as to whether Mr. Nixon knowingly and voluntarily consented to the statements made by Mr. Corin at trial.

Accordingly and totally pursuant to those orders we will proceed with this matter.

THE COURT: You are the party – under the Supreme Court clarifying the order, you are the party with the burden.

[7] MR. STRICKLAND: We are here pursuant to that order; yes, sir.

THE COURT: And therefore to some degree the parameters of this hearing will be governed by what you put on.

MR. STRICKLAND: That is correct, Your Honor. But we are here pursuant only to the order of the Supreme Court. I would like to reiterate at that time it expands the scope of the issue which we brought before the court. Thank you, Your Honor.

THE COURT: In what way – I was reading from the order, the Supreme Court's order. They are the ones who sent it down here.

MR. STRICKLAND: Yes, Your Honor.

THE COURT: If it is a contemporaneous objection then it is overruled.

MR. STRICKLAND: Thank you, Your Honor.

THE COURT: I assume the Supreme Court is capable of addressing itself clearly. This matter was briefed and presented before them before they issued the second order; is that not correct?

MR. STRICKLAND: Yes, Your Honor. But I think it is very important to reiterate that objection at this time so I did so.

THE COURT: I understand that you need to make [8] that for the record. The Court notes your objection but will comply with the order of the Supreme Court.

Any comments from the State?

MR. MARKY: Yes, Your Honor. Since there was mention of confidential communication, I would like the Court to have a copy of Turner v. State out of the Florida Supreme Court, 1988 in September of this year.

Your Honor, the Florida Supreme Court in that case relinquished jurisdiction while the appeal was pending regarding whether the defendant involuntarily absented himself from the trial.

They've got down "Defense counsel asserted the attorney/client privilege. The Florida Supreme Court remanded it the second time and indicated that the claim of ineffective assistance of counsel removed all the confidentiality privilege, and the lawyer was obligated to testify."

I just wanted that in the record in the event it is asserted again at some later juncture in this proceedings – I want the Court to be aware of that.

They cited an old First DCA case, and there are several federal cases on the same subject that I would be more than happy to go into with the Court, if the Court sees fit. But I think the 1988 opinion [9] of the Supreme Court together with the order they sent to this court are applicable.

THE COURT: Well, let me check with both counsel. Now, you filed a 3.850 claiming ineffective assistance of

counsel, and the Defendant personally signed that motion under oath. At that time it is the Defendant who is saying that my representation at trial through counsel was ineffective – I had ineffective assistance of counsel; is that not correct?

MR. MARKY: In a normal situation that would be.

THE COURT: But, I mean, that is a statement by the Defendant and therefore we know at that point we have a defendant who is contending ineffective assistance of counsel.

Thus far, I find nothing in the record , other than the Appellant's point having been raised, of ineffective assistance of counsel – that Mr. Nixon has made any claim of ineffective assistance of counsel.

MR. STRICKLAND: Your Honor, if I may respond.

THE COURT: Yes, sir.

MR. STRICKLAND: Your Honor, this is obviously not a typical 3.850 proceeding, it is not a 3.850 proceeding at all.

We are here pursuant to the order of the Supreme Court – the issue that was raised on appeal was a [10] chronic [sic] issue which raised the issue of whether there was required to be an on-the-record consent.

Accordingly, the objection I interposed does not waive the attorney/client privilege. We are here specifically to the two Supreme Court orders, which I previously noted. Thank you.

MR. MARKY: Your Honor, I would like to make one further point. The Supreme Court cited from the Turner opinion which was then not published in Southern Second, its original order. It also cited the rules governing attorney conduct.

"Upon order of the court, counsel can make representation and testify about those matters between he [sic] and his client."

When this order first went up the Florida Supreme Court sent it back and you sent it back up. The State filed a brief and correctly pointed out that there was a challenge to the competency of counsel which required a resolution – now, they can't come in here and claim one thing and then keep the State from presenting other evidence. In fact, the State told the Court that we understand that Mr. Nixon was wanting to limit the issue of consent. The Supreme Court disagreed and we modified the order.

Now, if he is merely re-asserting the original [11] issue, and that is that the record had to show at that time – I would submit there is no reason for the hearing. But if Mr. Nixon is going to testify, Your Honor –

THE COURT: Well, I can cut that short. I presided at the trial.

MR. MARKY: I understand that.

THE COURT; And if there is an issue as to whether there was a request for that determination to be made during the course of trial, the answer to that is no, there was no such request. If the question is did the Court initiate such an inquiry on its own, the answer to that is no, the Court did not. If the question is regardless of where, was there such a colloquy engaged in and was there such a determination made, the answer to that is no, there was not.

So for that purpose there is no need to have an evidentiary hearing, if that is –

But I have an order from the Supreme Court of Florida that says we are going to conduct an evidentiary hearing and it says that the witnesses that will appear at that evidentiary hearing will be those called by the Appellant, Mr. Nixon. He bears the burden and will be the proponent of witnesses and the State may cross-examine those witnesses.

[12] So at this point I would turn to Mr. Strickland and say, who is your first witness?

MR. STRICKLAND: Your Honor, I would like to make a response, if I may.

THE COURT: All right.

MR. STRICKLAND: The second order is strictly procedural. The last sentence of that paragraph indicates that when it was sent back by this Court, it was sent back for a clarification procedure contemplated by the Supreme Court. It is procedural, Your Honor, and –

THE COURT: Well, explain to me what you are telling me.

MR. STRICKLAND: Mr. Marky, I believe, indicated to the Court that they had a right to proceed with other witnesses. In support of what I view as the court's ruling in the second order of the Supreme Court is that essentially, as I understand it, the Court is ruling that it is my obligation to go forward and be the proponent of the witnesses.

THE COURT: That is correct.

MR. STRICKLAND: Thank you, Your Honor.

THE COURT: So call your first witness.

MR. MARKY: Do I understand the Court is saying the State will not be able to call witnesses?

[13] THE COURT: That is correct.

MR. MARKY: The State will not be able to call any witnesses?

THE COURT: That is correct.

I think we discussed that at a status conference and at that time I indicated that if your position was that the State was going to be able to call witnesses that you were going to make a proffer for record purposes, and that proffer could probably be made. But the Court will make no findings with respect to the testimony and –

MR. MARKY: Your Honor –

THE COURT: As I understand the order of the Supreme Court, the Appellant has the burden of moving forward. According to their language, "He will be the proponent of witnesses and the State would have the right to cross-examine."

That to me is not unclear at all.

If the State views that in a different interpretation and urges a proffer for record preservation purposes in the event the Supreme Court may have anticipated that or envisioned that in their order, then fine, they will have that preserved for record purposes. But I do not so view it and I will make no finding with respect to the evidence that might be [14] proffered in that regard.

MR. MARKY: Your Honor, the State would like to interpose at this time an objection to being denied the opportunity to call witnesses for the Court to consider.

I understand that you are following the order, but I need to state my objection.

THE COURT: I also under that under Florida's contemporaneous objection rule that if you don't utter those magic words at this particular point you will be deemed to have waived them. Therefore, I will now overrule your objection.

Now, shall we go back to the fourth call. Who are your witnesses?

MR. STRICKLAND: Your Honor, as I understand it, you have now ruled that there will be a proffer?

THE COURT: No, I have not ruled that there will be a proffer. I have only ruled, as I do in every case, that if for record protection purposes there is desired to be a proffer that I will entertain it. Sometimes there is professional proffer, which is an accounting of what is proposed by counsel.

In this type of case I don't prefer to do that. I want it on the record so there is not someone else saying what someone else said. If the Supreme Court [15] desires to make an examination of it then you all can hash that out before them and –

MR. STRICKLAND: In that case, Your Honor, I would ask the Court that I be permitted to interpose any objections which I may have to the proffer immediately prior to it.

THE COURT: Certainly. Now, who is your first witness?

MR. STRICKLAND: Your Honor, pursuant to our previously interposed objection, we would call Michael Corin.

THE COURT: Now, you are calling Mr. Corin with Mr. Nixon's consent and permission and thereby waiving the

attorney/client relationship? You are calling counsel who represented Mr. Nixon at the trial of this case.

MR. STRICKLAND: Your Honor, we are not waiving the attorney/client privilege. We are here, as I have indicated, pursuant to the two orders of the Florida Supreme Court, which have directed this hearing. We have interposed an objection as to –

THE COURT: Excuse me. Mr. Strickland, you are using the pronoun we. Now, who is we? Does that mean you and Mr. Nixon?

MR. STRICKLAND: The defense, Your Honor.

[16] THE COURT: Does that mean you?

MR. STRICKLAND: Your Honor, that means the defense.

THE COURT: That is not responsive to my question. In other words, if Mr. Nixon wishes to claim the attorney/client privilege communication – that is not one that is just there, he has to claim that.

MR. STRICKLAND: That is correct, Your Honor.

THE COURT: I need to know. Do you have the authority to claim that?

MR. STRICKLAND; Your Honor, I view that – respectfully, Your Honor – I do not mean to be evasive of your question, but that is a matter between the Defendant and his attorney and I do not wish to answer it.

If the Court rules that I must answer then I will do so under protest.

THE COURT: Has Mr. Nixon and Mr. Corin had the opportunity to discuss that?

MR. STRICKLAND: Your Honor, at this time Mr. Corin is not Mr. Nixon's attorney.

THE COURT: But he was at the time.

MR. STRICKLAND; Your Honor, he is not his attorney at all at this time. In fact, these proceedings are pursuant to – as I indicated, they are only to this [17] order.

I have indicated an objection as to these proceedings specifically based on the attorney/client privilege. Mr. Corin, if he takes the stand – we have called him pursuant only to those orders and there has not been a waiver at all of – we are calling him pursuant to the two orders of the court.

THE COURT: We are out of the orders now.

MR. STRICKLAND: But, Your Honor –

THE COURT: Excuse me. We are out of those orders now from an evidentiary standpoint. You are calling a witness.

MR. STRICKLAND: That is correct.

THE COURT: Even under your interpretation of those orders, you are calling a witness. You are calling a witness who was formerly counsel to this defendant and out of an abundance of caution I am asking you now does that or does that not – is that or is that not accompanied by a waiver of confidentiality?

Because if you ask questions that places that in issue, then who is going to claim that confidential relationship on behalf of Mr. Nixon?

MR. STRICKLAND: Your Honor, the parameters of the evidentiary hearing that we have today are specifically directed by the order of the Supreme Court.

[18] THE COURT: That is correct.

MR. STRICKLAND: Accordingly, we have been attached with the burden, under protest – under the objection I previously noted with the obligation to go forward.

THE COURT: If you choose to.

MR. STRICKLAND: Your Honor –

THE COURT: It is up to you. You don't have to call any witnesses at all. It was the defense – the appellant that interposed the point at the appellate court that it had not been covered at the trial court level and it was remanded back for the relinquishment of jurisdiction to give the appellant the opportunity to develop a record so that the Supreme Court could review it.

In a sense, this hearing is for the purpose of giving you that forum should you opt to do so. Now, you can call witnesses, but you are not under any obligation to do it.

MR. STRICKLAND: Yes, sir, Your Honor.

THE COURT: You can fold your tent right now.

Before we get into a cat fight I need to know exactly where you are going to be coming from should you ask a question of Mr. Corin. You announced him and he got up and walked all the way up to the notch [19] in the door and then recognized I was about to move into another area, and then he sat down.

But if you ask a question that calls for the intrusion into the attorney/client confidential relationship and Mr. Corin says, I have not been informed that I am authorized to make that statement, it invades the confidential communication relationship, therefore I decline to answer that question.

Now, it is responsive to your question so – what I want to know is what is your position going to be? Can Mr. Corin answer your questions or not?

MR. STRICKLAND: Your Honor, for record purposes, I would ask the Court if it is the Court's ruling that in order for me to call Mr. Corin I have to waive the attorney/client privilege.

THE COURT: No, sir; not at all. That is a facet of testimony that I anticipate will probably come up. You can put him on the stand and ask him his name and occupation – you can ask him a number of questions that don't have anything to do with the attorney/client relationship between Mr. Corin and Mr. Nixon. So in that event that doesn't arise. I am only asking if that comes up what is your position going to be?

MR. STRICKLAND: Well, Your Honor, my position is that we are here, as I indicated, pursuant to two orders.

[20] If the Court will not direct Mr. Corin to answer the questions except if the defense waives in a limited fashion the attorney/client privilege then that is a different story. But I think perhaps it would be appropriate at that time – if Mr. Corin takes that position then we can approach it at that time.

As I indicated before, at that time there will be an issue which I believe the Court will have to rule on, and that is whether he has to answer without a waiver.

THE COURT: Well, you are going to ask the questions. Mr. Corin was not behind any doors, that I am familiar with,

when gray cells were passed out. The public defenders are a wide-open butcher knife referring to malpractice cases and I doubt I am going to hear Mr. Corin's testimony absent a waiver if he will claim it, which he may. I expect it. And at that point – you know, after a while the foil starts to get a little – why don't we go ahead and tee him up and see what happens.

MR. STRICKLAND: Thank you, Your Honor.

THE COURT: Mr. Corin, would you please approach the bench and be sworn by the clerk and then take the witness stand.

Thereupon,

[21] MICHAEL CORIN

having been first produced and duly sworn as a witness, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STRICKLAND:

Q For the record, would you state your name, address and occupation?

A Mike Corin. 2728 Everett Lane, Tallahassee, Florida. I'm an attorney.

Q Are you familiar with why we are here today, Mr. Corin?

A Yes.

Q Were you the defense attorney for Mr. Joe Nixon at the trial of this matter?

A Yes.

Q Did you tell him you were going to concede guilt and seek leniency?

MR. CORIN: Your Honor, I decline to answer that question based on the attorney/client privilege.

I am a little unclear. I was not subpoenaed by Mr. Strickland; I was subpoenaed by the State to be here, and of course they knew I would be here.

Reading the Supreme Court's order, at least the first order from last year, it indicated that privilege would not be waived unless I was apparently in a legal [22] proceeding where my effectiveness was challenged.

I have not seen any documentation or affidavits or anything as to that. I have not been released from my privilege by my former client for purposes of these proceedings.

MR. STRICKLAND: Your Honor, I would ask for a ruling as to whether he would be directed to answer the question that I posed without a waiver of the attorney/client privilege.

THE COURT: Well, let me put it back into context. You called the witness and you are proponent of the witnesses. Now, he has asserted this attorney/client communication privilege, which he may. But it is your question. Now, are you going to ask that I instruct the witness to answer your question?

MR. STRICKLAND: Yes, Your Honor.

THE COURT: Is your request of me to direct this witness to answer your questions considering the fact that you are counsel for Mr. Nixon, and you have raised the point on appeal. Now, are you in asking me to direct this witness to answer your

question waiving on behalf of Mr. Nixon the attorney/client privilege?

MR. STRICKLAND: At this time, Your Honor, –

THE COURT: You may answer yes or no. I would [23] direct that you so answer.

MR. STRICKLAND: No, not at this time, Your Honor.

THE COURT: In that event, then I will honor the witness' attorney/client confidentiality.

MR. STRICKLAND: In that case, Your Honor, the Defendant, under protest and the previous objections that I have indicated and communicated and the protest of the waiver of the attorney/client privilege – at this time the Defendant so waives the attorney/client privilege to the limited extent of the questions which I will ask.

THE COURT: If you waive the attorney/client privilege, then I would like to hear argument as to whether you may limit that waiver. I am of the view that a waiver of the attorney/client privilege acts as a waiver of that privilege insofar as the door being opened on cross.

In other words, it would not be appropriate on cross examination for a cross-examiner to go beyond the scope of direct simply because there has been a waiver of the privilege.

I don't know that you have the right to limit it beyond that. I think, yes, you may limit the attorney/client privilege testimony of Mr. Corin to the extent that it bears on the question that you are [24] asking and the subject matter which you broach, but once you open the door wherever there is normal evidentiary boundaries on cross examination, he may proceed to inquire.

MR. STRICKLAND: Your Honor, I believe my specific statement was under protest, as I previously – and I would reiterate that.

THE COURT: You can say under protest, but that doesn't make it under protest.

MR. STRICKLAND: The attorney/client privilege is waived to the limited extent of those questions that I ask. The issue –

THE COURT: Excuse me – well, proceed, excuse me.

MR. STRICKLAND: The issue as to what the State may do on cross is for a determination of the Court at that time.

THE COURT: Well, you may make your statement for the record that you are going to waive the attorney/client privilege and limit that waiver exclusively to the questions you will ask, but the order from the Supreme Court, which I am looking at, says that you are the proponent of witnesses and the State will have the right to cross-examine those witnesses.

My tentative ruling at this point, so that you [25] might be alerted – it is not a ruling, but if you ask a question that calls for that waiver and Mr. Corin responds to it then it is limited only by the usual application of cross examination rules. That is, there is a reasonable latitude of cross examination with respect to the testimony given.

So you may ask whatever questions you want to.

MR. STRICKLAND: Thank you, Your Honor.

MR. MARKY: Your Honor, we would object to any attempt to limit the State. I am also troubled by the fact that we don't have an inquiry from the Defendant personally. The

question comes as to whether he discussed this waiver or non-waiver of the confidential communication.

THE COURT: I have already covered that in the previous questioning of Mr. Strickland. That was, I wanted to know who was waiving and he said we, and there are two people over there. He said the defense, and there are still two people over there. I did not take it in this type of proceeding that Mr. Strickland would proceed without that authority.

MR. MARKY: Very well, Your Honor, but we do object that any answering of questions would be limited to –

THE COURT: I have already ruled on that.

[26] All right, Mr. Strickland, you may proceed.

MR. STRICKLAND: Thank you, Your Honor.

BY MR. STRICKLAND:

Q Mr. Corin, I would like to ask you again, you were the defense attorney for Mr. Nixon at the trial of this matter?

A Yes, I was.

Q Did you tell Mr. Nixon that you were going to concede guilt and seek leniency?

MR. CORIN: Your Honor, so I may be clear, am I free to answer that?

THE COURT: You are – upon request of the Appellant's counsel to the Court to direct you to answer that question, I am acceding to that request of counsel accompanied by the waiver of confidentiality.

MR. HANKINSON: I am sorry, sir. But so we don't get down the road and get into something unanticipated by the defense, we do anticipate even given the Court's ruling to take a proffer of Mr. Corin's testimony, albeit it may be limited – excuse me, our initial cross examination may be limited by the scope of direct.

I want to make sure it is clear that we intend to offer Mr. Corin as a witness for proffer purposes. It is my understanding of the Court's ruling that the [27] objection that could be interposed at that time would not be confidentiality between attorney and client in lieu of the fact it has been waived at this proceeding.

THE COURT: My response to that is only with respect to the rulings that I make now will that confidentiality be breached.

MR. HANKINSON: I'm not clear on that, Judge. Mr. Nixon has called Mr. Corin.

THE COURT: In other words, Mr. Strickland or Mr. Nixon has called Mr. Corin.

MR. HANKINSON: Right.

THE COURT: And he has directed – he has requested me to direct Mr. Corin to answer questions – the request has been made. To that end, Mr. Strickland having waived his attorney/client privilege on behalf of his client for direct response of the questions put to him – that is the extent of the waiver. You can call Mr. Corin all you want to, but if he declines to answer on the attorney/client privilege regardless of whether it is – I am not going to direct him to answer the question.

MR. HANKINSON: Judge, I don't believe a proponent of a witness can get up and say we want to waive the privilege a

little bit, which is essentially what, if I understand the Court's ruling, you are saying that he is going to be able to do. Once he waives the privilege, [28] Judge, the communications between them are waived.

THE COURT: All right. You all can fight about that back before the Supreme Court. I'm sure it will make an interesting argument.

Picking back up on the record in response to the witness' inquiry upon request of counsel for the defense, I am instructing you to answer that question.

MR. MARKY: To which, Your Honor, I object.

THE COURT: I am tired of listening. I want to hear what we are here for.

MR. MARKY: It is a different one, Your Honor –

THE COURT: Ask your question.

BY MR. STRICKLAND:

Q Mr. Corin, did you tell Mr. Nixon that you were going to concede guilt and seek leniency at trial?

MR. MARKY: Your Honor, I would object to the conclusion that counsel conceded guilt. I don't think that is accurate as to what occurred at trial.

THE COURT: Overruled.

BY MR. STRICKLAND:

Q Mr. Corin, did you tell Mr. Nixon that you were going to concede guilt and seek leniency at trial?

A I discussed with Mr. Nixon how I was going to approach the case.

MR. STRICKLAND: Your Honor, if I might have a [29] moment.

THE COURT: All right.

(Pause in the proceedings)

BY MR. STRICKLAND:

Q Mr. Corin, did you tell Mr. Nixon what you were going to say in your opening and closing statements.

A Not specifically. If you are asking me did I read him an outline of my opening statement, the answer is no.

Q Did you tell him what you were going to say.

A Not in exact words. I told him what I was going to do.

Q Did you tell Mr. Nixon that you were going to say to the jury in court at trial, "I think you will find the State has proved beyond a reasonable doubt each and every element of the crimes charged in first degree premeditated murder, kidnapping, robbery and arson?"

A If you are asking me if I told him those exact words, my answer is no, I did not.

Q You previously said that you told him how you were going to approach the defense.

A Yes, sir; I did.

Q I ask you again, and I will remind you that the Court has heard this question and has overruled the objection [30] to it, did you tell Mr. Nixon that you were going to concede guilt and seek leniency?

MR. HANKINSON: Objection. That's just repetition of what has already been asked and answered, Your Honor.

THE COURT: Overruled.

A Did I tell him how I was going to approach the case? Yes, I did.

If you are asking me did I tell him that I was going to go into court and say you're guilty and try to save your life, then probably not in those exact words.

BY MR. STRICKLAND:

Q When you told him how you were going to approach the case, did he affirmatively agree for you to do it that way?

A I have to phrase my answer as close to the truth as possible, so probably the best answer, he did not.

Q Did you tell Mr. Nixon that you would concede that the State would prove its case against Mr. Nixon?

A I think I answered that question earlier.

THE COURT: If counsel is not clear as to your response, I am going to direct that you respond to it.

MR. CORIN: Pardon?

THE COURT: I said, if counsel is not clear as to your response, I am going to direct that you answer it again.

[31]A Well, I think what I said is, I told him how I was going to approach the case.

The exact words that you are phrasing in your questions, I don't recall using those words.

Q Did you tell Mr. Nixon that on opening argument you would say, "In this case there won't by any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeanne Bickner's death?"

A Did I tell him those exact words, no, I did not.

Q Did you tell him that that would be the approach that you would take?

A Are you asking me whether Mr. Nixon and I had conversations over the period of time that I represented him wherein how I was going to approach the case was discussed? Are you asking strategy?

Q No, I am not asking that at all.

What I am asking is the following: Did you tell him that you were going to make statements to the effect that they would concede guilt?

A Probably in the course of our discussions, he was informed on more than one occasion that that was how I was approaching the case.

Q Did he affirmatively agree for you to do this?

A Again, the best – the most honest answer I can give you on that question is, he did not.

[32]Q The question was , did he affirmatively agree for you to do this?

A I gave you my best answer.

Q Did he say, write or do anything to demonstrate his consent or approval of your doing this?

A Again, he did nothing.

Q Did he say, write or do anything to demonstrate his approval?

A He said nothing, he did nothing and he wrote nothing. He did nothing.

Q Did you tell him that it was his right to keep you from admitting guilt in saying the things which I quoted to you earlier – to keep you from doing those things?

A He was given the opportunity to express his displeasure or unhappiness with my representation and he did nothing.

Q Now, I have asked you a question as to whether you told him it was his right to keep you from admitting guilt and saying the things I have mentioned.

A I probably didn't phrase it that way.

Q Did you tell him that by approaching the proceedings this way that it would be tantamount – by saying rather –

Did you tell him that by saying those things, that you said in your opening and closing statements, that it [33] would be tantamount to giving up his right to an adversarial testing of the State's case.

MR. HANKINSON: I am going to object to the leading nature of the question. He has called this witness and –

THE COURT: Overruled.

BY MR. STRICKLAND:

Q Let me say that over, Mr. Corin.

Did you tell Mr. Nixon that your opening and closing statements would be tantamount to giving up Mr. Nixon's rights to an adversarial testing of the State's case against him?

A I don't know how to answer that question, I really honestly don't.

I mean, you are providing the answe. by phrasing the question. Mr. Nixon is not an unintelligent person and he knows –

Did I sit down and go through with him a litany like the Court might in taking a plea of guilty; no, I did not, if that is what you are getting at. But Mr. Nixon, I am sure, was aware of it.

MR. STRICKLAND: Your Honor, I have asked the witness if he told him he was giving up his right –

BY MR. STRICKLAND:

Q Mr. Corin, did you tell him he was giving up his [34] right to an adversarial testing of the State's case?

A The answer is – if I have to answer yes or no, I would have to say no because I don't think I gave –

Q Thank you.

Did you tell him what you were going to say on your opening and closing arguments would be the same as entering a guilty plea?

A No. I don't think it was.

Q Did you ask him the questions that a judge would normally ask him if he were entering a guilty plea before the court?

A I think I answered that. I didn't go through that type of inquiry with Mr. Nixon with regards to his case.

Q Did you tell him what rights he waived by your saying those things?

A I am not so sure any rights were waived.

MR. STRICKLAND: That is not responsive to the question, Your Honor. I would like for you to direct him to answer –

MR. MARKY: Judge, he is objecting to the answer of a question he posed. I think his answer is clear.

THE COURT: The objection is sustained. I would ask that he be responsive directly to the question.

MR. HANKINSON: But, Your Honor –

[35] THE COURT: I have ruled on the objection.

BY MR. STRICKLAND:

Q Did you tell Mr. Nixon what rights he waived by you making these statements.

A I did not sit down with him and say you are giving up your right to cross-examine witnesses or call witnesses in your behalf, those type of things. No, I did not go through a litany of those.

MR. STRICKLAND: Thank you, Your Honor.

THE COURT: Do you tender the witness?

MR. STRICKLAND: I do, Your Honor. Thank you.

THE COURT: Mr. Hankinson.

CROSS EXAMINATION

BY MR. HANKINSON:

Q How are you presently employed, Mr. Corin?

A I'm an assistant public defender.

Q And how long have you been employed as an assistant public defender?

A Total time or just most recent?

Q Most recent.

A I think 1979, December of 1979.

Q Let's go back and get a little background.

Where did you get your undergraduate degree?

A My associate degree was from Daytona Beach Junior College, and my bachelor's degree was from Florida State [36] University.

Q When did you get your bachelor's degree from Florida State?

A December of 1964.

Q And in what area?

A Criminology.

Q After that did you have any further studies before going to law school?

A Yes, sir, I went to graduate school at Michigan State.

Q And when was that?

A From 1965 until 1966.

Q Okay. What did you study there?

A Police administration and public safety.

Q At a graduate level?

A Yes, sir.

Q Did you have any work while you were doing that?

A At Michigan State I worked in Jackson Prison.

Q What did you do there?

A Reception counseling.

Q After finishing at Michigan State – when you terminated your stay there at Michigan State, where did you go.

A I came to Tallahassee, Florida in July of '66.

Q July of 1966?

[37]A Yes, sir.

Q What was our occupation after that?

A I was a regional supervisor in the division of youth services.

Q How long did you do that?

A A little over two years.

Q Did you do any further graduate work during that time?

A Yes, sir.

Q And what was that?

A In criminology.

Q At what school?

A Florida State University.

Q And when did you start law school?

A In the fall of 1968.

Q And when did you graduate?

A In December of 1970.

Q After graduating from law school, what is the first occupation you had?

A I was a research assistant in the criminology department at FSU.

Q For how long?

A For about nine months.

Q And what did you do there?

A We worked on a grant to see if we could have [38] regional correction centers in the Southeast.

Q And you finished there is believe in September of 1971?

A Yes, sir.

Q Okay. What did you do starting in September of 1971?

A I went to work for the Attorney General's Office.

Q And how long did you work at the Attorney General's Office?

A About four years and three months.

Q And what was your position there?

A An assistant attorney general.

Q And what were your duties?

A I worked in criminal appeals.

Q During the course of that did you handle any capital cases?

A Yes, sir.

Q Do you remember approximately how many?

A No, sir.

Q Where did you go after leaving the Attorney General's Office?

A Private practice.

Q How long?

A Approximately six months.

Q And did that involve some criminal work?

[39]A A very small amount.

Q And it took you up through July of 1976?

A Yes. In June of 1976 I began working part time in the Public Defender's Office.

Q And how long were you at that point an assistant public defender?

A A full assistant I think from July of 1976 until the following December of 1977.

Q And what did you do during that period of time?

A About half of my time was spent doing appellate work and the other half doing trial work.

Q And after that – in January of 1978 where did you go?

A With the Federal Public Defender's Office.

Q And was that criminal defense work?

A Yes, sir.

Q And how long did you do that?

A Eighteen months.

Q And that takes us up to August of 1979.

At that point what did you begin to do?

A I went back to work for the State Public Defender's Office.

Q And what were you doing at that time?

A Capital Appeals.

Q Appeal work to the Supreme Court?

[40]A Yes, sir.

Q And do you have any idea how many capital cases you did during that period of time.

A Direct appeals probably – well, it's hard to say, but on my own probably six or seven.

Q That took you up through when?

A I stopped doing those exclusively probably around June of 1981.

Q And what did you start doing after June 1981?

A Just trial work.

Q An assistant public defender on the trial level?

A Yes, sir.

Q And is that currently what you are doing?

A Yes, sir.

Q During the course of your legal experience – well, first as an assistant attorney general, did you do any teaching or lecturing?

A Yes, sir.

Q In what areas?

A We would lecture to law enforcement and other state attorneys on current procedures in effecting arrests.

Q You lectured to assistant state attorneys?

A Yes, sir.

Q Now, since being a public defender have you lectured at any conferences or seminars.

[41]A Yes.

Q At what conferences and seminars have you lectured?

A The Public Defender's Office sponsored what we called Life Over Death seminars. And that would be about every year or eighteen months, and that started somewhere around 1980.

Q Since 1980?

A Yes.

Q How many times have you lectured there?

A I'm not sure, but probably about four or five times at least.

Q Explain what that seminar is, Life Over Death.

A It is a meeting essentially of public defenders or people who work in capital litigation.

Q So these are people who pretty much exclusively are involved in representation of capital cases?

A Pretty much.

Q And you have lectured to that group?

A Yes, sir.

Q On four or five occasions?

A I think so, yes.

Q And in what area did you lecture on?

A Generally the update of the Supreme Court cases from the Florida Supreme Court.

[42]Q Have you done any lecturing or teaching at FSU Law School?

A I sometimes teach in Nancy Daniels' internship program.

Q Okay. For the record, what is Nancy Daniels' internship program?

A She is one of the persons at Florida State University College of Law who works with interns and she has a course requirement that they take before they intern.

Q So you have been selected by her as one of the people who come in and discuss – do you discuss plea negotiations?

A Yes, sir.

Q How often have you done that?

A Probably as long as she has been there I would do it once each semester. So it would probably be four, five or six times.

Q Have you taught at any continuing education programs?

A Do you mean like –

Q Like lectured CPE courses.

A Yes. I did teach at the Center for Professional Education a couple of years ago.

Q What was the nature of the topic?

A Capital litigation.

[43]Q Have you been called as an expert witness on a claim of ineffective assistance of counsel?

A Yes.

Q How many times?

A Twice.

Q And by whom were you called?

A The defense.

Q In both instances by the defense?

A Yes, sir.

Q In both instances were you qualified as an expert to give your opinion on such claims?

A Yes. Well, I –

Q You can explain yourself, if you need to.

A Well, as with any kind of a case a lawyer tried to get the witnesses to answer the questions his way and – I was qualified as an expert, but I wouldn't necessarily give the answers that they wanted.

Q You weren't called upon – you didn't agree to give a specific opinion?

A No, sir.

Q But you were qualified as an expert by the court?

A Yes, sir.

Q And you testified?

A Yes, sir.

Q And both of those were ineffective assistance of [44] attorney that was claimed?

A Yes, sir.

Q You indicated that you have handled a number of capital cases on appeal, and I believe you indicated that you could not remember how many you handled as an assistant attorney general.

Have you tried any capital cases?

A Yes.

Q How many capital cases have you tried?

A Well, Mr. Nixon and – you mean alone or –

Q With someone or by yourself. One in which you had a substantial part.

A Two.

Q Have you taken part in any other capital cases?

A Well, when you say taken part in – if you mean ask questions then probably two times.

Now, if you are asking me, as an assistant public defender, do I discuss cases with other lawyers in the office and work on cases together; yes, we do. I can't count the number of those.

Q So it is clear for the record – prior to this hearing you were not willing to discuss the facts of your conversation with Mr. Nixon with me, were you?

[45]A No.

Q Now, you testified on direct that you discussed with Mr. Nixon the strategy that you intended to employ in his case; is that correct?

MR. STRICKLAND: Objection, Your Honor. Your Honor, I would object to that because I don't believe he testified as to strategy. He said his approach.

MR. HANKINSON: I don't see any difference, but I think strategy is the word he used, Your Honor. If that is critical we can get the court reporter to look it up and read it back.

MR. STRICKLAND: Your Honor, if I may, we specifically object to that because what we said was –

THE COURT: All right. We will take a break and let the court reporter review the record.

(Recess in the proceedings)

THE COURT: All right. Have we drawn the proper semantical conclusion?

MR. HANKINSON: Yes, Judge. We gave up trying to go back through this record. I would just rephrase it a little bit.

THE COURT: All right. It had all the earmarks to me of about one-third of a cup of coffee dispute.

All right, you may proceed.

BY MR. HANKINSON:

[46]Q I believe you indicated on direct that you discussed with Mr. Nixon how you were going to approach his case; is that correct, Mr. Corin?

A Yes.

Q Okay. What did you tell him about how you were going to approach the case?

MR. CORIN: Your Honor, am I free to answer that question?

THE COURT: That is within the scope of direct and within the scope of my direction.

On the previously-made objection by Mr. Strickland, and if he wishes to renew his objection, the objection will be overruled.

MR. STRICKLAND: Thank you, Your Honor.

BY MR. HANKINSON:

Q Do you need me to repeat that?

A Did I discuss with him how I was going to approach the case?

Q Well, what did you tell him, that is what I am interested in.

A Well –

MR. STRICKLAND: Your Honor, I am going to object as to what he told him.

What I asked Mr. Corin was did he tell him how he was going to –

[47] THE COURT: And he answered yes, which was an answer given in response to the question put to him on direct. The scope of cross is dictated by the responses of the witness and not necessarily the questions that were asked. That answer was given, and it is within the proper scope of cross.

I will overrule the objection.

MR. STRICKLAND: Thank you, Your Honor.

A Yes, I spoke with Mr. Nixon as to how I was going to approach it.

BY MR. HANKINSON:

Q And what did you tell him?

A I told him that if the State didn't accept a plea that my goal was to try to save his life, and to do that – we had a situation in which my belief was the evidence was very, very strong –

Q So that essentially is what you told him?

A Essentially.

Q How many different times did you discuss this with him or attempt to discuss this with him?

A Well, minimally – at least three times.

Q If I understood you correctly on direct you said that he gave no response at all?

A Right. He didn't say that is fine or that is bad or anything.

[48]Q Okay. I believe you indicated that you gave him the opportunity to respond or to object; what did you mean by that?

A Well, we discussed it more than one time; approximately three times.

You are a prosecutor and I don't think you have ever defended a client; isn't that right?

Q Right.

A Mr. Nixon and I had a relationship that went back prior to his arrest in this case. You get a feel for what your client understands and you have a knowledge of their situation and –

Q I guess I am not totally following you.

A Well, maybe I don't understand your question.

Q Okay. It was my recollection that you said that you give him the opportunity to object to this approach that you had laid out?

A Yes. I would state my theory of the case to him and my theory of the defense. Now, this is over a period of time

– well, it was over a period of months. I was never told not to do that.

Q During the course of the trial what level of cooperation did you get from your client?

MR. STRICKLAND: Your Honor, I object. I didn't ask about cooperation.

[49] THE COURT: I will sustain the objection.

MR. HANKINSON: May I be heard on that, Your Honor?

THE COURT: Yes, sir.

MR. HANKINSON: The question was whether the client agreed to a certain course of conduct, that is the way the question was phrased.

At another point the question was did the Defendant object. I think it does have bearing on whether he agreed or objected as to whether the Defendant was in fact cooperating with him during the course of the trial. That is the reason for my question.

THE COURT: Same ruling.

MR. STRICKLAND: Thank you, Your Honor.

BY MR. HANKINSON:

Q Prior to trial what level of cooperation did you have with Mr. Nixon?

MR. STRICKLAND: Your Honor, I object to the issue of cooperation prior to trial, that did not come up.

THE COURT: I will sustain the objection.

BY MR. HANKINSON:

Q You indicated that your discussion with Mr. Nixon – if the State would not agree then this would be your approach?

A I don't understand your question.

[50]Q Tell us what your approach was that you decided to take in the course of this trial.

A Well, my approach –

MR. STRICKLAND: Your Honor, I object. I did not get into what the approach was. What I asked him specifically was about the opening and closing statements – the specific statements he made at trial.

THE COURT: I will overrule your objection.

THE COURT: I will overrule your objection.

BY MR. HANKINSON:

Q Do you want me to restate the question?

A Yes, sir.

Q What was your approach?

A That I would try to minimize the State's guilt phase.

Q I believe you said you were going to take that approach if a plea was not offered or a plea was not forthcoming from the State; is that correct?

A Right.

Q Okay. Did you pursue plea negotiations?

MR. STRICKLAND: Objection, Your Honor. That has to do with a matter which I did not broach on direct.

THE COURT: I will sustain your objection.

MR. STRICKLAND: Thank you, Your Honor.

BY MR. HANKINSON:

Q Before you made the decision to approach the case [51] in this way, what investigation did you do of the case?

MR. STRICKLAND: Your Honor, we did not – Objection. We did not get into what Mr. Corin may have done or didn't do in investigating the trial.

That is an issue which is not before the Court and it would be appropriate for a collateral approach on a 3.850 motion. It is outside the parameters of the issue raised on appeal and the order from the Supreme Court.

THE COURT: I will only allow limited cross on that as to the motivation behind his approach to the case.

MR. STRICKLAND: Your Honor, if I may be heard – investigate the case.

THE COURT: He is only asking him did he investigate the case.

MR. STRICKLAND: Your Honor, I did not inquire as to whether he investigated the case. That is something outside the scope of my direct.

THE COURT: Overruled.

MR. STRICKLAND: Thank you, Your Honor.

BY MR. HANKINSON:

Q What did you do in your investigation of the case before you decided to approach the case in this particular way?

A I did what I normally do particularly in a [52] capital case.

I had my investigator interview witnesses and I interviewed witnesses also, and I did depositions.

Q Take many depositions?

MR. STRICKLAND: Your Honor, objection.

THE COURT: I will sustain the objection.

MR. STRICKLAND: Thank you.

BY MR. HANKINSON:

Q When you discussed with Mr. Nixon the approach that you intended to take did you ever discuss with him any other possible options?

MR. STRICKLAND: Your Honor, I did not ask Mr. Corin about any other possible options. That is outside the scope of direct examination.

THE COURT: I will overrule the objection as to that question.

BY MR. HANKINSON:

Q In your discussions with Mr. Nixon did you discuss with him other possible options other than the approach you decided to take?

A Such as?

Q Well, did you discuss with him the possibility of the reasonable doubt approach in contesting the evidence?

MR. STRICKLAND: Very respectfully, Your Honor, Mr. Hankinson is getting in to the issue of alternative [53] defenses. What Mr. Corin may or may not have done, that is appropriate – that is an issue which is only appropriate in the traditional 3.850 area.

We are going far afield now of what I asked Mr. Corin on my direct examination. Anything along the lines about a discussion about what Mr. Corin might have done or should have done or otherwise, that is a violation of the discussion I had with him on direct and it is a violation of the attorney/client privilege. It has not been waived as to what they discussed as to alternative –

THE COURT: I am going to overrule the objection. During the course of your examination, and it is on the record, you asked him among other things whether he had informed or advised Mr. Nixon of the variety of rights that he had. Included in that questioning was the right for an adversarial critique – that is one of the questions that you asked.

Within the ambit of that scope of the question and his response to it – did you advise him of certain other options that might be there adversarily emphasizing the reasonable doubt burden placed on the State, and any other matter of that nature -- I will overrule the objection.

BY MR. HANKINSON:

Q Did you have any discussions as to that nature, [54] Mr. Corin?

A Yes, sir.

Q If you would, just relate to us the essence of what you told him.

A My assessment of the State's case was that the State was going to be able to fulfill their burden as to his guilt and if we had to go to trial, if there was not going to be a plea for life, that the defense would be to try to save his life in the penalty phase.

I discussed with him all of these avenues.

Q All of what?

A These avenues.

Q They were discussed with Mr. Nixon?

A Yes.

Q You are indicating affirmatively?

A Yes.

Q Mr. Strickland, in his questions, asked you – I think the question was in the sense of, did you tell Mr. Nixon that you were waiving all of his rights.

Let me put the question in this sense. Did you believe you were waiving all of Mr. Nixon's rights?

MR. STRICKLAND: Objection, Your Honor.

Mr. Corin's belief at that time would have no bearing on what he actually said or did at that time. Your Honor, I did not, once again, broach that issue on my direct.

[55] MR. HANKINSON: Judge, the question was asked, did you explain to him that you were waiving his rights to trial, that you were giving up the right to make the State prove its burden?

I think the fact that this witness would say that he didn't give up those rights certainly has bearings on the fact that he didn't explain them to Mr. Nixon.

THE COURT: In response to Mr. Strickland's question, or one of several questions in that area, he said, no, I did not believe he was giving up any rights. He has answered that question once. But I will overrule the objection.

MR. HANKINSON: Okay. That answer was not clear to me that that was in the record.

There were three or four – there was a series of questions that –

THE COURT: I have overruled the objection.

BY MR. HANKINSON:

Q Did you believe that you were giving up those rights that Mr. Strickland proposed that you had given up by this?

A In a technical sense, probably not. But in a practical sense, probably so.

Q Did you preserve certain objections during the [56] course of the trial?

A Yes, sir.

Q Now, you mentioned that you had come to have some rapport with the Defendant or some understanding of how to relate to him because you had represented him for a long time.

How long had you been representing Mr. Nixon?

A I am not sure exactly when I began to represent him, but it was probably in the fall of 1983.

Q And why were you representing him at that time?

A On unrelated charges.

Q So you have represented him since November of '83?

A Yes.

Q And this trial took place when?

A In July of 1985.

MR. HANKINSON: If I could have just a moment, Your Honor.

(Pause in proceedings)

MR. HANKINSON: That is all the questions I have at this time.

THE COURT: Redirect, Mr. Strickland?

MR. STRICKLAND: We would rest, Your Honor.

THE COURT: Thank you very much, Mr. Corin.

Do you have any other witnesses?

MR. STRICKLAND: That will be all, Your Honor. Thank you.

[57] MR. MARKY: Does the Court wish to hear any argument on this matter?

When I read the first order, the first order asked the Court to make findings and conclusions. And the second order doesn't say not to.

THE COURT: The second order does not.

The first order was couched in terms of a judicial inquiry. The second order simply says an evidentiary hearing of the record for the appellate court to review. It appears that – there is simply nothing there for them to review and examine.

On the second order it appears, Mr. Marky, that I would be a presiding officer for there to be presented whatever the proponent of the witnesses might have for that court to review. There's seven of them and one of me so –

MR. MARKY: So it will go back as it is?

THE COURT: I invite comment on that.

My initial reaction is that it is to preside and allow presentation of that evidence for their further consideration in support of the position taken by the Appellant.

The issue of ineffectiveness of counsel was not raised at the trial level. I do recall at the close of the case where I think I made observation as to the [58] defense.

But at this point I do not see that it was placed upon the trial court any responsibility for making findings of fact or conclusions of law for them to review other than I have given everybody a chance to say their say, as I interpret the order, and this will now go back up. I assume oral arguments will be held by the Supreme Court and counsel will have their opportunity to present to the court the conclusions they draw from the evidence, and the court may draw its own conclusions. It's not for me to do that, as I see it.

If I am in error on that then I'm sure they will remand it and direct that I make findings of fact and conclusions of law.

MR. MARKY: Your Honor, if we might just have a moment.

(Pause in proceedings)

MR. MARKY: Your Honor, we will be communicating with the Attorney General's Office as to what legal argument to make since Your Honor has – I mean, this is it. They didn't ask you to make findings or conclusions or –

THE COURT: The one area that I have some – why I have some reference is because it was not remanded [59] back for relinquishment or jurisdiction for further proceedings with respect to an issue that presented itself to the trial court, but simply to supplement a record for their review.

Now, if it had dealt with an issue at the trial court level then I think it might in some way be appropriate to say yes, I now hear this and I find –

MR. MARKY: Your Honor, I would just note that the Court modified the ineffective assistance of counsel and – they selected relinquishment.

Ineffective assistance of counsel was never raised at the trial level during the trial at all. Now, why the Supreme Court of Florida didn't require the filing of a formal allegation, I don't know. But we have not had evidence –

THE COURT: I don't know either. And there's no 3.850 motion pending.

If there was a 3.850 then yes, it would be my responsibility to make that. But the Supreme Court did not cast it as a 3.850 and they didn't direct a 3.850 be done. They just simply said here it is.

MR. MARKY: But, Your Honor, they did send it back and relinquished the determination of facts surrounding his claim of ineffective assistance of counsel. That is broader than whether or not the [60] Defendant did or did not consent or did or did not object. We have really not had that hearing and – I'm certainly not placing blame on this Court, but I just think that – it is clear in my mind that the court meant this to be a traditional ineffective assistance of counsel.

3.850 is what revokes [sic] jurisdiction of the court. Well, the Supreme Court already had jurisdiction and it gave it back. That is what they did in the Turner case, that I cited to the Court; that was a relinquishment of jurisdiction. It went to whether or not he was personally present, which is also alleged in a 3.850.

This is perhaps a problem that the court – the Supreme Court deviated from what they have done in other cases, and that is to relinquish with 30 days to file a motion to vacate. But I would suggest they didn't do it so I guess we are stuck with the confusion that –

THE COURT: Okay. I think if they wish to have that then they will send it back rather directly. Otherwise, I think they

will review the record as it relates to the contentions of the Appellant on appeal. They will review it and draw their own conclusions.

MR. HANKINSON: If I may make one other comment so the record is not unclear when it goes back up.

The Court made mention of an option for us [61] proffering testimony, yet at the same time it indicated that the proffer would be limited by the attorney/client privilege.

Basically, the additional testimony would be – we would have proffered further testimony by Mr. Corin explaining his actions. I understand the Court's ruling and I am not trying to re-argue it, but I do want it clear on the record that that would essentially be the testimony to be proffered.

THE COURT: If you had called Mr. Corin even on a proffer, you wouldn't have gotten anything out of him other than what you got on cross.

MR. HANKINSON: I understand that. That is why I am trying to clarify it for the record.

MR. MARKY: For the record, we do object that on an ineffective assistance of counsel claim, the State is denied an opportunity to adequately present the evidence it deems would have been appropriate for a proper determination of whether Mr. Corin was ineffective or not ineffective.

MR. STRICKLAND: You will not request memorandum or argument, they will make the finding; is that correct?

THE COURT: Correct. We have held a hearing and the evidence has been presented. The issue at the [62]appellate level is was there or was there not. They will have the record before them and you may argue it.

MR. HANKINSON: Your Honor, would you direct that a transcript be prepared?

THE COURT: Yes.

(Thereupon, this hearing was concluded.)

[63] (Certificate omitted in printing)

(5)

Supreme Court, U.S.
FILED
MAY 14 2004
OFFICE OF THE CLERK

Case No. 03-931

IN THE SUPREME COURT OF THE UNITED STATES

State of Florida,

Petitioner,

v.

Joe Elton Nixon,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

JOINT APPENDIX
VOLUME II

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Certiorari filed December 22, 2003
Certiorari granted March 1, 2004

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[8] IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324

STATE OF FLORIDA,

vs.

JOE ELTON NIXON,

Defendant.

PROCEEDINGS: Hearing

HELD BEFORE: Honorable J. LEWIS HALL

DATE: Wednesday, August 30, 1989

TIME: 9:00 A.M.

LOCATION: Courtroom 3C
Leon County Courthouse
Tallahassee, Florida

REPORTED BY: Eugenia B. Lawrence
Official Court Reporter

Eugenia B. Lawrence
Official Court Reporter
Leon County Courthouse, Room 404
Tallahassee, Florida 32301

[9] APPEARANCES

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[10] PROCEEDINGS

THE COURT: Let the record reflect we are back under a relinquishment of jurisdiction pursuant to order of the Supreme Court of Florida in the case of State of Florida vs. Joe Elton Nixon that was identified in the Circuit Court of Leon County as Case No. 84-2324 and captioned in the Florida Supreme Court as Joe Elton Nixon vs. the State of Florida.

Now, a brief review of progress of the matter to get to this point. There was raised during the course of the Florida Supreme Court review the issue of ineffective assistance of counsel that arose primarily in general terms as a result of trial tactic and strategy employed by Mr. Corin at the time of trial, in which essentially upon the outset Mr. Corin conceded that Mr. Nixon had committed the homicidal act itself. It was raised post issue at the Supreme Court level under the format of ineffective assistance of counsel. In that regard, an order of October 20, 1987, the Florida Supreme Court relinquished jurisdiction back to the Circuit Court of the Second Judicial Circuit and in its order of remand sent it back for evidentiary hearing. The provisions of it essentially were that the trial court would inquire of Mr. Corin and Mr. Nixon as to whether Mr. Nixon was informed of and knowledgeably and voluntarily consented to [11] that strategy.

The provisions of that order caused some discomfort to all the components. Accordingly, clarification was requested of the Florida Supreme Court in that regard.

By order dated October 4, 1988, the Supreme Court relinquished jurisdiction back to the Second Circuit and noted therein that the Appellant, who raised the issue at the Supreme Court level, would have the burden of establishing the claim of ineffective assistance of counsel and it would be the Appellant who would be the proponent of witnesses, with the State having the right to cross-examine the witnesses.

That hearing was conducted. The Appellant presented Mr. Corin I think only as a witness. Is that not correct, Mr. Strickland? I don't think there were any witnesses other than Mr. Corin.

MR. STRICKLAND: Mr. Corin only, Your Honor.

THE COURT: Upon conclusion of the presentation of that witness, the Appellant announced that it had no further witnesses to call.

The State desired at that point to present witnesses and to present evidence. The Court ruled at that time that the matter had been resubmitted to the Florida Supreme Court and a request for clarification. I concluded from the order by which it returned here that those [12] terms and provisions were specific in their application and, therefore, denied the State the right to present witnesses because the terms of the order provided that only the Appellant would be the proponent of witnesses and the State's participation would be limited to cross-examination. I, therefore, denied the State's right to present evidence.

The matter then went back to the Supreme Court and has again been relinquished in jurisdiction back to this court. The order now – and to digress for moment, revert back – and I was questioned by counsel, appropriately, at the close of the former hearing with regard to findings of fact. I noted on the record at that time that I was not inclined to enter any findings of fact because, under the terms of the order, and in view of the State's desire to present evidence, the Court had not conducted what the Court would consider to be a complete evidentiary hearing, and, therefore, it would not be appropriate to make findings of fact based on incomplete evidence.

In retrospect, in view of the most recent order, I am grateful I did not make findings of fact because it would put this

court in the position of having made findings of fact previously, before exhaustion of the hearing.

It now is back for pretty standard evidentiary format, and that is the Appellant still has the burden of [13] proof and may with the presentation of any evidence that it might see fit to or to stand on the evidence previously presented and so note for the record. The State, under the most recent order, has the right to present evidence, witnesses, and upon conclusion of the presentation and probably with a reserved time by the Court to review the evidence status of the case, make findings of fact in its order and the matter then go back to the Florida Supreme Court.

It's my view, reading the orders that are now collectively before the court, that the Appellant has raised the issue of ineffective assistance of counsel to the Florida Supreme Court, the order of relinquishment of jurisdiction for this court notes that, as it is the Appellant who raised the issue, it is the Appellant's burden to establish either that Mr. Nixon – well, to re-gear it – the issues posed by the Supreme Court in its order is whether, one, Mr. Nixon was informed of the trial tactic to concede commission of the act or, two, knowing it, consented to it, or, three, was aware of the tactic and acquiesced in it.

However, with the Appellant bearing the burden of proof, perhaps better stated, it's the Appellant who has the burden of proving, in support of its contention of ineffective assistance of counsel, that Mr. Nixon was [14] neither told, nor consented, nor was aware and acquiesced in it.

To any extent that the protraction of these proceedings might cause other inconvenience, discomfort, or whatnot at the Florida Supreme Court level or any level that might thereafter be invoked, my apologies to my colleagues above. And I wish to make sure they understand the caution with which these proceedings have progressed has not been motivated by any

obstreperousness or reluctance to adhere to your order, but simply out of an abundance of caution to make sure in any case, especially in a capital case, that all safeguards are observed and that the requirements of the appellate court are meticulously observed, followed , and that what flows from this Court will be in keeping with their desires. If there has been any misunderstanding in that regard, then with respectful deference to my colleagues, I apologize.

All right. Against that backdrop, Mr. Strickland, on behalf of the Appellant Mr. Nixon, do you have any opening comments that you might wish to make?

MR. STRICKLAND: Yes, Your Honor. I want to interpose an objection, just as I did the last time we were here. The Appellant once again objects on the basis that the issue raised on appeal was a limited issue, not an expanded issue as the Supreme Court has now presented it [15] and remanded it to this Court.

The issue on appeal concerns the issue of written consent pursuant to U.S. vs. Cronic. It is not an ineffective assistance of counsel brought pursuant to Rule 3.850. If it were in the posture, it would be appropriate for Capital Collateral League to be in these proceedings which they, of course, are not. And the issue is limited by the framework which the Appellant, through his attorney, posited it to the Supreme Court.

Accordingly, having so objected, also on the basis – as previously on the basis of attorney-client privilege, Your Honor, I note for the record that we are here now on the basis of three orders. I believe they are dated October 20th, 1987, October 4, 1988, and then the last order from a February 1st, 1989. And we are here pursuant only because of the framework issued by the appellate court, Your Honor.

Thank you.

THE COURT: Ruling on your motion, the objection is overruled.

Any preliminary comments from the State?

MR. MARKY: I just want it on the record for further review this objection that has been posed, that he didn't raise it, it's limited – it's been presented to the Supreme Court now three times and they have obviously [16] disagreed with him. And, therefore, we think – that is our position, that we think the Court's announced ruling is correct. But, I wanted that so that the Supreme Court understands it.

THE COURT: I was about to inquire did you wish me to revisit the ruling.

MR. MARKY: No, Your Honor. I just want the Supreme Court to be aware how we read their decision.

THE COURT: I have every confidence that you probably will have the opportunity to tell them personally.

Okay. Mr. Strickland, having the burden, do you wish to present any further evidence with regard to the issues on remand.

MR. STRICKLAND: No, Your Honor. My understanding of the proceedings is that we are going to republish or have the Court take note of the immediate previous hearing, which was December 19, 1988. I believe the Court has now been provided with a copy of that transcript. That is our presentation.

However, Your Honor, as I presented to the State and also to the Court yesterday a request that the Court take judicial notice of the entire transcript and that entire record of the trial court and I had noted for the Court's convenience some

particular aspects of that record. And I believe I have spoken to the State about that.

[17] MR. HANKINSON: We have no objection to that, Your Honor. I believe it is a part of the record, as a matter of fact.

THE COURT: They have been delivered to the Court. I will now place it in the court files.

I would concur with Mr. Hankinson's observation. They are a part of the court file. But, less [sic] there be no misunderstanding, for the purpose of this hearing, they will be entertained by the Court as an exhibit for this hearing and in conjunction – not in conjunction, but with the same point in mind, you now tender the transcript of the proceedings conducted on December 19, 1988, complete with Mr. Corin's testimony also for the purpose of this hearing?

MR. STRICKLAND: That is correct, Your Honor.

THE COURT: In other words, it is part of the record, it's part of the record on December 19th, but in an abundance of caution you also want to make sure it's part of the hearing held today, August 30, 1989.

MR. STRICKLAND: All right. As well as the entire record that the Court heard back in I believe 1985, the record of the trial.

THE COURT: The trial transcript would be entertained as part of the record for this proceeding.

MR. STRICKLAND: Thank you, Your Honor.

[18] THE COURT: You apparently then rest with respect to presentation?

MR. STRICKLAND: Yes, Your Honor. Thank you.

THE COURT: All right.

MR. HANKINSON: We will call Mike Corin.

THE COURT: The most recent order gives the State leave to present evidence. Do you wish to call Mr. Corin?

MR. HANKINSON: Yes, sir, Your Honor. And I would also ask that the record reflect that from a quick perusal of the December 19th transcript, I don't see that it reflects that the Defendant was present on that date and that he is present here in the courtroom today. I would like the record to reflect that.

THE COURT: Mr. Nixon has been present at all hearings conducted.

MR. HANKINSON: Thank you.

THE COURT: And is present today.

All right. Mr. Corin, would you please approach? Mr. Clerk, would you swear the witness?

(WHEREUPON, THE WITNESS WAS SWORN BY THE COURT CLERK)

MR. STRICKLAND: If I may interpose an objection as to any testimony given by Mr. Corin. It's protected by the attorney-client privilege, Your Honor. And Mr. Corin has already testified in these proceedings in court and the State had a full and ample opportunity to cross-examine [19] Mr. Corin, which it availed itself of. And, for that reason, Your Honor, we object.

We do not waive Mr. Nixon's privilege with Mr. Corin. Thank you.

MR. HANKINSON: We wouldn't have any problem with that being a continuing objection so we wouldn't have to keep interrupting the flow of Mr. Corin's testimony. But, I think –

THE COURT: The ruling of the Court in that regard is that the order of October 20, 1987, entered by the Florida Supreme Court specifically cites the case of Turner vs. State. Their cite on it was 12 Florida Law Weekly, 238. I'm sure by now it's been incorporated into the official Southern Reporter.

MR. MARKY: I think you had a copy of that case earlier, and handed it to Mr. Strickland.

What is the Southern Reporter cite?

MR. MARKY: 530 So.2d beginning at Page 45. And the language, Your Honor, is at Page 46, "Under the evidence code, the privilege does not exist in these circumstances."

MR. STRICKLAND: Your Honor, if I may speak to that particular issue?

THE COURT: Yes, sir.

MR. STRICKLAND: The issue was actually resolved on Page 47 when it – and it's at, I believe, the first [20] paragraph. It says, "Specifically, he claims – " and this has to do with the claim – "counsel failed to advise him of his right to voir dire and charge conference participation. In addition, he denies authorizing counsel to waive his presence, thereby implying that counsel did in fact waive his presence without his consent."

And the Court, in its ruling on that particular point says, "Accordingly, we find that Turner no longer has any attorney-client privilege as to communications – " and then comes the key working – "concerning his crucial stage presence or waiver thereof."

In other words, it's limited. And that is exactly what we have here.

THE COURT: All right. The ruling of the Court is that the issue before the Florida Supreme Court and, therefore, the issue before this court raised and framed by the Supreme Court deals with the issue of ineffective assistance of counsel in three specific areas. The Appellant is the one who raised that issue and, therefore, the Supreme Court has seen fit to rely, and I think appropriately so, on the Turner case. And that is, under these circumstances, the attorney-client privilege is not available to be invoked unless there is an abandonment of the claim for relief.

In other words, you can't – I don't see that you can [21] say we are going to contend that counsel was ineffective in assistance, and then claim the confidential communication privilege and continue to maintain the position.

MR. STRICKLAND: Your Honor –

THE COURT: I don't expect counsel to really argue that point in this situation. But, that is the basis of the ruling of the Court. I'm going to overrule your objection.

Mr. Corin, in a sense in defense of his representation of Mr. Nixon, may testify with regard to communications between him and Mr. Nixon within the scope of the claim made by the Appellant as it applies to Mr. Corin. I will overrule the objection.

MR. STRICKLAND: Thank you, Your Honor.

MR. CORIN: Your Honor, before we start, at the last hearing I was examined by both Mr. Strickland and the State and I don't know that any of my answers would change from that date to this date. I am sure they would not. And I feel very uncomfortable with the fact that Mr. Nixon is not releasing me from the privilege and I don't intend really to testify as to matters that were not raised at the prior hearing. And I recall the Court advising the State, upon objection about the limited nature of the privilege, that he would not direct me to answer any questions posed by the State if I objected [22] based on the privilege. So, having received no new allegations since the last hearing concerning my relationship with Mr. Nixon and how that might have been effective or ineffective, I don't feel free to respond to any inquiry, but would reaffirm my prior testimony at the December 19th hearing.

THE COURT: For what purpose does Mr. Marky rise?

MR. MARKY: I just wanted to make a response with respect to Mr. Corin's statement.

THE COURT: Yes, sir.

MR. MARKY: And that is that the Canons of Professional Ethics and the Supreme Court in the Turner case goes on to say that the Court may direct the witness to answer the questions where the circumstances are such that the attorney-client privilege no longer exists.

While I understand his discomfort, Your Honor has the authority under the code to direct him to answer. It specifically says so, and the witness must answer the questions.

MR. CORIN: Your Honor, I would also – I mean, I am the one who seems to be under the gun here. And I would point out that the code says "when required by a tribunal to reveal such

information, the lawyer may first exhaust all appellate remedies."

I have not yet –

[23] THE COURT: I'm sorry. I did not understand –

MR. CORIN: If you require me to reveal information that I think is in violation of the privilege, prior to that I must first exhaust all appellate remedies. I says that I may, not Mr. Nixon. But, as an attorney, I may.

But, I cannot exhaust appellate remedies until I know what it is I would be objecting to if they asked me a certain question, I guess. I guess we could proceed by a proffer of questions and then if I object, then I guess we could seek appellate ruling.

THE COURT: Well, it shouldn't be too difficult because there is already a vehicle in place.

MR. HANKINSON: The last time I checked, the Florida Supreme Court was our appellate court of last remedy. I think they have pretty well addressed this issue based on Mr. Strickland's objection last time.

THE COURT: All right, sir. I am going to direct the witness to respond – as a general directive, to respond to questions posed by the State with leave to request guidance or instruction when you see that or perceive that perhaps a question is beyond the issue as you understand it, where it's a little far afield from these specific issues in this case.

All right, Mr. Hankinson.

WHEREUPON,

[24] MICHAEL MAYNE CORIN

was called as a witness, having first been duly sworn to speak the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HANKINSON:

Q State your name, please.

A Michael Mayne Corin.

Q I believe back at the December hearing you indicated you were employed with the Public Defender's office. Are you still so employed?

A Yes, sir.

Q At the previous hearing you indicated that you had started representing the Defendant Mr. Nixon in the fall of 1983, is that correct, on other charges than the murder case?

MR. STRICKLAND: Your Honor, if I may. That goes beyond the issues raised by the Supreme Court, not raised by the Appellant. That is, the question, as the Court has in its opening – or in the Court's opening statement or summary, whether he was informed of the strategy to concede guilt and seek leniency, whether he knowingly and voluntarily consented to the strategy, and whether he affirmatively consented.

It has nothing to do –

THE COURT: Well, that is not quite accurate. The [25] third prong is whether if he did not affirmatively consent, acquiesced to its use. That third prong is, in my perception, an

extremely broad standard because of the use of the word "acquiesced." And in order for that to proceed – and the reason I would overrule the objection is, how is someone supposed to perceive that someone else has acquiesced brings into play as relevant proof or disproof of the fact of consequence to Appellant at any proceedings, of their ability to perceive and judge whether that person did or did not acquiesce. Therefore, historical background information, acquaintanceship, knowledge of, the ability to observe communications, verbal or nonverbal, is brought into relevancy.

So, did you start representing Mr. Nixon back in 1983 I think is relevant to did you know Mr. Nixon, did you know Mr. Nixon well enough to understand what Mr. Nixon was saying, did you know him well enough to understand what nonverbal communications might have been communicated by Mr. Nixon even if he didn't say anything.

MR. STRICKLAND: Well, Your Honor, it goes – my objection is it goes beyond the scope.

Thank you, Your Honor.

THE COURT: Overruled.

BY MR. HANKINSON:

Q And if you were looking for that reference, it's on [26] page 55.

A 55.

Q Let me restate the question.

In the previous hearing you indicated you had started representing Mr. Nixon in the fall of 1983; is that correct?

A To the best of my knowledge.

Q And what was the first charge that you were appointed to represent him on?

A I don't specifically recall. It would be a matter of record.

Q In the fall of 1983, how many charges were you appointed to represent him on?

A Again, I don't specifically recall.

Q You don't recall what charges you represented him no?

A Well, I represented him on several different –

Q Well, tell us what charges you recall representing him on.

A I think I represented him on an attempted burglary and a robbery, and maybe battery on a law enforcement or corrections official at some point.

Q Okay. Three additional cases to the murder case; is that correct?

A To the best of my recollection.

Q Robbery, burglary, and battery on a law enforcement officer?

[27]A To the best of my recollection.

Q Now, do you recall were the robbery and burglary charges being prosecuted at the same time? Were those overlapping pending matters?

A Again, to the best of my recollection.

You have got to understand I have represented hundreds of clients over the years on numerous cases. As to exact points in time – I mean, it's a matter of, I assume, public court record to pull out Mr. Nixon's files and give me the exact dates and I can verify them.

Q During the course of representing Mr. Nixon on the robbery charge, do you recall how that case was resolved?

A Yes.

Q How was that resolved?

A To the best of my recollection, during jury selection the alleged victim saw me sitting with Mr. Nixon in the courtroom, signaled me. I had talked with her numerous times prior to the trial. She said, "That is not the man who robbed me."

I said, "Yes, I didn't think it was." I had I think subpoenaed his younger brother, I think it's Joseph, to come to the courthouse. I think he was in the training school at Marianna at the time. We were informed of the witness' statement to me. I think we took the witness back into the holding cell, at which time she identified his younger brother as the [28] assailant.

I think she had misidentified Mr. Nixon because law enforcement officers had shown her a picture of Mr. Nixon when he was about the age that his younger brother was as opposed to a picture of him at the time of the offense.

But, essentially, based on that information, the State dropped the case.

Q So, you had gotten right up to trial, in fact, had started the trial, correct?

A Yes.

Q Had you discussed with Mr. Nixon the strategy that you were going to employ during the trial?

THE WITNESS: Your Honor, I would decline to answer that question.

MR. HANKINSON: The question calls for a yes or a no, doesn't require the disclosure of confidential communications even aside from any other objections. I would ask the Court to direct the witness to answer the question.

MR. STRICKLAND: Your Honor, it clearly calls for privileged information, has no bearing on this. What he discussed with this client at some previous time has no bearing on this at all.

THE COURT: Direct the witness to respond to the question.

[29] THE WITNESS: Your Honor, I'm very, very uncomfortable responding to matters that I think are subject to the privilege, when the Canons clearly permit me to exhaust appellate remedies.

I would ask –

THE COURT: At this point, the basis of the Court's ruling, in light of the issue posed by the Supreme Court, one of the issues at least tangentially is do you discuss strategy with

your clients. I do not see that as an intrusion on confidential relationship. It is not so much whether he discussed strategy with you as much as it is did you discuss your trial strategy with him.

THE WITNESS: Well, Judge, I think that reveals information that occurred during the representation of a client and I respectfully at this point would decline to answer that and would ask permission to have a break to speak with some other lawyers in my office as to how to proceed at this point.

THE COURT: Okay. I will grant your request, certainly.

MR. HANKINSON: Maybe some direction to Mr. Corin would be helpful so that we can proceed without having to take a break every time. If the Court would like me to do that, I don't have any problem telling him basically where I am going, although it's basically what the Court [30] has said, if the Court wishes me to do so.

THE COURT: I have no problem with you informing Mr. Corin as to the general thrust of where you intend to go in your questions so that when he meets with his colleagues, they will have a more extensive basis for discussion.

MR. HANKINSON: It's basically as the Court has set out. I intend to develop Mr. Corin's prior dealings with his client, to show the communication and some rapport developed so they were able to communicate, and Mr. Nixon's understanding of the processes and strategies employed. I mean, there is nothing really secret about where I'm going. That is where I intend to try to elaborate on.

I think that would be helpful to the Court's ruling and to the Supreme Court's later review.

THE COURT: Although somewhat unusual, do you have any clarifying questions you wish to put to Mr. Hankinson with respect to that so that you might discuss it?

THE WITNESS: I think the end result of all this is I'm going to decline to answer. My impression or what I feel is I'm going to decline to answer any questions which relate to any discussions that I might have had with Mr. Nixon. I do not decline to answer any matters that are essentially public record. But, as to matters that he and I may have discussed during the period of time [31] that I represented him as a client –

THE COURT: Including this case?

THE WITNESS: Including any matters that were not done at the hearing in December of this year, inasmuch as at that time, Your Honor, the Court ruled that the State would be allowed to cross-examine me as to matters that Mr. Strickland raised after having waived the privilege for Mr. Nixon to the limited extent of his direct and the limited scope of proper cross-examination. And I just don't feel that I can, as a lawyer, in the clear face of Mr. Nixon exercising his privilege today, answer any questions.

I will discuss it again with lawyers in our office. I did discuss it with them yesterday and based upon 4.16, Subsection D, it was our impression at that time that –

THE COURT: Well, you have announced your intention in that regard. You have also announced that, given the Court's direction to respond to the questions – of course, I cannot direct you to respond to questions that have not yet been asked. But, with respect to the question that has been asked, I think it falls within the purview of the directive of the Florida Supreme Court, it falls within the issues as framed by the directive to answer those questions. It would be my view, however, that if it's your desire, appropriately, to have appellate review [32] with regard

to it, that review can be within the ambit of these proceedings because it is on relinquishment from the Florida Supreme Court. The Florida Supreme Court is the highest appellate body in this state, at least to my knowledge.

I would imagine that rather than go through an independent appellate review of the Court's ruling, that issue could be resubmitted and posited right to the Supreme Court in conjunction with these proceedings and a rather rapid determination made.

THE WITNESS: Judge, I would have no –

MR. HANKINSON: We are going to have some response to that, Judge, on what procedure the Court can take. But, I would prefer he be allowed to take the break he has requested, decide for sure what he is going to do, unless he now has decided that and does not want to consult with people.

THE WITNESS: Well, I want to consult with some people. But, what I would like to suggest, Your Honor, is if it is determined that I'm not going to answer certain questions, what my suggestion would be – and heavens knows that has been around a long time, it has been back now since February – I would ask that the questions be posed, I interpose the privilege at the proper time, and then a transcript of that proceeding be certified to the [33] Supreme Court. And if they direct me to answer, then we can have the hearing next week, if so directed, at least this portion of the hearing.

MR. HANKINSON: That is not the procedure that the State suggests, Your Honor.

THE COURT: What is the procedure the State suggests?

MR. HANKINSON: What we are here on, Judge, is a claim that the Defendant has raised.

THE COURT: I understand.

MR. HANKINSON: It is his ability to waive this privilege.

I think if Mr. Corin is going to impose this confidential privilege, I think it is up to the Defendant to either waive the privilege or abandon his claim of ineffective assistance of counsel that he has raised in the Supreme Court. I mean, if he refuses to waive it –

THE COURT: No, that won't fly. The privilege can be invoked by counsel and can be maintained until released. It's not required that the individual client be the one who announce it.

MR. STRICKLAND: Your Honor, if I may –

THE COURT: It is one of the problems inherent in this proceeding. The lawyer is a professional person who says I have not been told that the privilege by which I am bound has been waived. Until I hear that waived or [34] until I am directed – and that doesn't give me heartburn or ego problems, but, in essence, until I am directed by a court higher than a circuit court, I am not going to waive the privilege.

MR. HANKINSON: Well, I'm not asking the court to waive it. I'm asking the Court to make sure on the record it is within the Defendant's power to waive the privilege.

THE COURT: Well, I think that is obvious.

MR. HANKINSON: Okay.

THE COURT: The Defendant can waive the privilege any time the Defendant wants to. Mr. Strickland, on behalf of the Defendant, has said, "We ain't waiving the privilege."

That is pretty clear, too.

MR. HANKINSON: If the record is clear –

THE COURT: Mr. Corin is saying if the Defendant has not waived the privilege, I am not going to breach the privilege.

MR. HANKINSON: Oh, I'm not asking the Court to do that.

THE CLERK [sic]: I'm directing him to answer the question because of the Supreme Court order, the citing of the Turner case, and my perception is that they have sent the case back for testimony by Mr. Corin and Mr. Nixon as to whether that took place.

[35] Now, if they cannot talk about on the record what took place, then the Supreme Court has exercised a rather futile undertaking. I don't believe that the Supreme Court of Florida undertakes futile missions. If they have sent it back here, citing the Turner case, it's obvious that they – to me, at least – that they would propose that testimony be given by either or both Mr. Corin and Mr. Nixon with regard to their communications respecting the trial tactic employed at the trial in the case. And, therefore, I have directed Mr. Corin to respond to the questions in that regard. He has declined to do so. He wants to go hold prayer and communion with his colleagues. If he comes back from that prayer session, then I think it appropriate that we go through whatever litany of questions you wish to ask him and those can be single-shot objected to or declined as the case may be, and then it [sic] be sailed right back to the Supreme Court, as the highest appellate court, to determine whether they will direct Mr. Corin to respond or not respond.

MR. STRICKLAND: Your Honor, if I may be heard on that point.

THE COURT: Yes, sir.

MR. STRICKLAND: Your Honor, I believe the suggestion by Mr. Corin is the appropriate one because of the following.

[36] The privilege and the privileged information at this point is of particular importance to Mr. Nixon. Mr. Nixon may well be back in a trial posture. Certainly at this time we are in a prosecutorial posture; we are not out on direct appeal. So, if the question posed causes a problem in that it would reveal information that is privileged to Mr. Nixon and Mr. Corin, and Mr. Corin has raised that as well, but if it is that, it is better to have it resolved appropriately by the Supreme Court than to have the information out, the harm done to Mr. Nixon, and then for the Supreme Court to come back and say that was error.

THE COURT: I don't think I said anything that does violence to that.

MR. STRICKLAND: No, Your Honor.

MR. HANKINSON: And I don't think the State has asked anything. I think the Court may have been confused by what I was saying, so it obviously wasn't very clear.

I'm not disagreeing with what you just stated. My concern was that the record not be perfectly clear that Mr. Nixon is at this point refusing to waive the privilege –

THE COURT: No. No, that is another little tangential problem in this type of proceeding. Mr. Nixon has neither claimed a privilege nor waived a privilege. Counsel for Mr. Nixon has declined to waive on behalf of [37] his client. And I'm not at liberty to find out as to whether Mr. Nixon has or has not waived the privilege. And I'm not at liberty to ask Mr. Strickland even whether he has asked Mr. Nixon about it.

Another nice little curlicue of this proceeding, because the relationship between Mr. Strickland and his client is confidential and any communications between them is in confidence.

I can only surmise, based on the fact that Mr. Strickland is a respected officer of this court, that he is presenting his client's desires. I don't know that, but I have to assume it.

But, I cannot inquire of him even as to whether he has discussed it with Mr. Nixon.

So, Mr. Nixon has neither claimed nor waived. I take the view that he has, however, through counsel, declined to waive the privilege. Accepting it at face value, I think that is where we are.

MR. HANKINSON: We are going to take a recess?

THE COURT: Uh-huh. Sounds like a good idea to me.

MR. STRICKLAND: Your Honor, may I have a moment to discuss with Mr. Nixon some of the proceedings in the holding cell where we have some privacy?

THE COURT: I am sure, to the extent possible, Lieutenant Peacock will accommodate that request within the parameters of reasonable security.

[38] THE WITNESS: Judge, I will try to be back in 15 minutes.

THE COURT: I don't put any time limit on that.

(COURT IN RECESS)

THE COURT: Where are we then in the proceedings?

MR. CORIN: Your Honor, I consulted with attorneys in my office and I would continue to object based on the attorney-client privilege to matters that were communicated between myself and Mr. Nixon.

THE COURT: All right. I think the Prosecution and the Defense have both made their positions abundantly clear then. I assume that it will now proceed, if you desire, on direct resolution by the Supreme Court as to whether he will be compelled to respond or not. I would suggest that we proceed with specific questions and response by the witness that he declines to answer that question.

MR. MARKY: Your Honor, obviously, when it goes to the Supreme Court, the Attorney General handles it in the Supreme Court, not the State Attorney. So I would like to put on the record, so that that person will understand the authorities, have the authorities in the record. I don't mean to take a great deal of time, Your Honor, and I won't do so. But, I would like to place it in the record so that is known by whoever prosecutes the case.

[39] THE COURT: I understand.

MR. MARKY: Your Honor, the cases cited – one of them is Wilson vs. Wainwright at 248 So.2d, Page 2249. It's a First DCA case.

Other cases where this has been addressed is Taskee vs. United States, 504 Fed.2d, 332, the Eighth Circuit, and United States v. Woodall, 438 Fed.2d, 1317, Fifth Circuit. Those cases collectively hold that by operation of law when a defendant makes a charge against counsel, counsel under both code and his ethical obligation is to reveal the communications between him and his client when it cures all false acts and that it trifles with the truth and it perverts justice to allow the charge of

incompetence to be made and then not to compel the relevant disclosure of that information.

That is the basis of the State's position as to why Mr. Corin has no legal right or entitlement to refuse to answer the questions propounded as the Court has previously ruled.

Thank you, Your Honor.

THE COURT: Primarily the basis for this Court's ruling on the issue. I think, though, we would be better advised to proceed, let Mr. Hankinson pose to the witness his specific questions so that, upon review, they will know exactly what was asked and what was declined, in [40] other words, a continuing objection by the Prosecution, and we will simply need a comment for the record by the witness that he declines to answer on the ground previously stated.

MR. HANKINSON: Judge, if I might, having been trial attorney yourself, I want to make clear on the record my question probably, in the final analysis, if there is no answer for me to posit the next question on, will, to some extent, be disjointed. Once we get a ruling from the Court, if that were to go on to the Florida Supreme Court, it may be there are intermediate questions that may need to be asked to elaborate on an answer.

THE COURT: I would assume, Mr. Hankinson, that if there are questions that are declined to be answered by the witness, that you can comment for the record at that time, contingent upon the witness' answer to that question, the State would pursue that topic by further questioning along the lines of, and then –

BY MR. HANKINSON:

Q Thank you.

I believe the question that was initially posited to the witness, and just to set the stage, I think we were talking about the robbery case that you had previously represented Mr. Nixon on. The question was, have you discussed your trial strategy in that case with Mr. Nixon?

[41] A I would decline to answer that.

MR. HANKINSON: Judge, I would ask the Court to rule that that does not require the disclosure of confidential communications. It is a question simply asking yes or no. And I would ask the Court to so find and direct the witness to answer on that basis.

THE COURT: With respect to that question, I find it does not call for disclosure of confidential communications and, if it has so required, wouldn't have directed the witness to answer.

MR. STRICKLAND: Your Honor, if I may, I would like to chime in here. I want the record to reflect also from the Defendant's standpoint that the objection as to the questions about confidential communications between Mr. Corin and Mr. Nixon – of the objections, and I will just list them. There are several of them.

One of them, it's beyond the scope of the proceedings, which I indicated to the Court before.

Two, it's beyond the scope of any waiver which occurred last time,

And it's beyond the scope of the case which was cited by the Supreme Court, Turner.

THE COURT: And that is a continuing objection to the entire line of questions posed by the State, and specifically, you

readopt that objection on any occasion that the [42] witness declines to answer?

MR. STRICKLAND: Yes, Your Honor. Thank you kindly.

MR. HANKINSON: So, the Court directs the witness to answer the question.

THE COURT: Yes. And he has declined to do so.

BY MR. HANKINSON:

Q Is that correct, Mr. Corin?

A Right.

Q Assuming that the answer to the question would have been that he had discussed the strategy with Mr. Nixon, my question would be: Did Mr. Nixon have any input or involvement in the strategy?

A At this time, I would decline to answer that question.

Q The next question relates to the burglary charge that you had mentioned.

How was the burglary charge resolved?

A I think he was – I'm not positive, but I think he was found guilty as charged. I think it was an attempted burglary of a dwelling.

Q Okay. That was a trial proceeding?

A Yes.

Q And you represented him during the course of that trial, correct?

A Yes.

[43]Q Before trying the case, had you discussed your strategy in that case with the Defendant, Mr. Nixon?

A I would decline to answer that question.

Q I don't know whether we have to have the Court direct him to answer the question in each instance, or we will assume –

THE COURT: On those areas where he declines to answer, for record purposes it may be assumed that the Court would direct the witness to answer them unless I specifically note otherwise.

BY MR. HANKINSON:

Q Thank you, Your Honor.

Assuming that Mr. Corin would have answered that he had discussed strategy with Mr. Nixon, I would ask him did he participate in forming that strategy as to how to approach the burglary case?

THE COURT: Who is "he?"

MR. HANKINSON: Mr. Nixon.

THE WITNESS: At this time I would decline to answer.

BY MR. HANKINSON:

Q Did the Defendant participate in the trial of the burglary case?

A I really don't recall. I forget – are you specifically relating to whether he – did he testify?

Q Let me clarify that.

[44] First, did the Defendant attend in person the trial – and let's start with the robbery trial.

You said you started jury selection. Did he attend that trial in person and was present?

A Yes, sir.

Q Now, as to the burglary trial, did he attend that trial in person?

A To the best of my recollection, he did.

Q Did he participate in that trial by testifying on his own behalf?

A That I do not specifically recall.

Q Do you have any notes that you would be able to use to refresh your recollection on that point?

A I may.

But, again, that matter was prior to the trial of the murder case and I'm not sure if I – generally, I keep notes. But I'm not sure that the office still has them. If there is not an appeal, sometimes those things are destroyed.

Q Was the Defendant cooperative in the two cases that we have talked about in dealing with you, the robbery case and the burglary case?

A I would decline to answer that question.

Q How did you perceive Mr. Nixon's intelligence?

A I would decline to answer that question.

Q Decline to answer that on what basis?

[45]A Because my perception may well be based on the communication.

MR. HANKINSON: Again, Your Honor, I would ask that the Court make a finding that it does not relate to the disclosure of the confidential communications for the witness to testify what his observations of the Defendant's intelligence was. I think that is something clearly outside that area.

THE COURT: I think what Mr. Corin is doing is saying that it's a conclusion that he would have necessarily reached, or reached necessarily, as a result of confidential communications, and that is intrusive into the privilege. Therefore, he declines to answer it.

Mr. Strickland rises to object.

Sustain the objection. But, I would – excuse me. Overrule the objection and would direct the witness to answer the question.

MR. STRICKLAND: And also, Your Honor, note my continuing objection based on all of my objections as to this entire line of questions.

THE COURT: I continue to note your continuing objection to the continuing line of questioning.

MR. STRICKLAND: Thank you, Your Honor.

BY MR. HANKINSON:

Q What were your observations as to the Defendant's [46] ability to understand the justice system?

A I would decline to answer that question also.

Q Did the Defendant appear to have a knowledge of the judicial system?

A I would decline to answer that question also.

Q Assuming Mr. Corin would have said that he discussed strategies with Mr. Nixon, I would ask the question: Did Mr. Nixon defer to your recommendations and strategies on these two cases?

A I would decline to answer that question.

Q My recollection is the burglary case was still pending when the murder occurred. Is that correct?

A As I recall, Mr. Nixon's sentencing was pending at the time of the homicide.

Q How soon after the Defendant's arrest for murder did you get involved in representing Mr. Nixon?

A At this time, I don't recall, but –

THE COURT: On that case?

MR. HANKINSON: Right.

THE COURT: The murder case?

MR. HANKINSON: Right. I'm sorry if I was not clear. Let me restate –

THE COURT: He was involved in representing Mr. Nixon at the time the event occurred.

MR. HANKINSON: Right. I'm sorry. Let me clarify [47] the question.

THE WITNESS: I think I know what your question is. When did I first meet with Mr. Nixon concerning the homicide?

MR. HANKINSON: Right.

THE WITNESS: My best recollection is it probably was the day of his arrest.

BY MR. HANKINSON:

Q The day of his arrest.

A The evening of his arrest.

That is my best recollection at this time. I could check my notes on that.

Q How did you approach the investigation of the homicide case?

A I don't understand your question.

Q Well, how did you go about investigating the case? What action did you take to investigate the homicide case?

A You mean in terms of demanding discovery, deposing witnesses.

Q Your actions, yes, sir, as an attorney.

A I did what I usually do.

Q And which is what?

A Well, demand discovery, take depositions, review reports, consult with other lawyers.

Q Okay. Did you have an investigator assigned to [48] assist you in your investigation?

A You mean a public defender investigator or –

Q Yes, sir.

A Probably so.

Q Do you recall who was assigned to assist you?

A Not at this time.

Q How much of your time were you able to devote to the representation of Mr. Nixon on the homicide case?

A I – I don't know what to tell you.

Q I mean, the question goes as to how –

A Probably shockingly little, if you want to know my opinion.

Q At some point in time, were you relieved of other duties in handling the homicide case?

A I think I was relieved of answering phone calls and actively working on other cases from the time we began jury selection until the time the case was disposed of.

Q Did you depose all the material witnesses in the homicide case?

A One, I don't know what your definition is of "material." And I don't recall exactly who was deposed. I do recall taking a lot of depositions.

Q During the course of the homicide representation, did you meet with your client, Mr. Nixon?

A Yes.

[49]Q During the course of those meetings, did you discuss what you might possibly do in the way of investigation?

A I would decline to answer that.

Q Did you discuss any possible Defense witnesses with Mr. Nixon?

A I would decline to answer that question.

Q Approximately how many times did you meet with Mr. Nixon?

A I couldn't accurately tell you at this point.

Q Did you keep any notes of your meetings?

A Yes, I did.

Q Okay. Do you have those notes with you?

A Yes, I probably have all of them. I'm not sure.

Q I would ask that the witness produce notes at this time of his meetings with Mr. Nixon.

A I would decline to do that, Your Honor.

Q Based on the attorney-client privilege?

A That is correct. And work product.

Q I beg your pardon?

A And work product.

MR. HANKINSON: Okay. I would ask that we take a few minutes and allow Mr. Corin to review those notes.

THE WITNESS: Your Honor, it's going to take a lot more than a few minutes if you want me to review my notes.

THE COURT: What is the –

[50] MR. HANKINSON: The question relates to he indicated he could not at this point tell us even an approximation of how many times he met with Mr. Nixon or talked with him. I think that is an important consideration. So, if the only way he can do that is by looking back through his notes, I would ask that he be allowed to do that.

THE COURT: Well, the ruling of the Court is going to be that I am going to note the continuing objection of the Appellant, overrule the objection of the Appellant, require Mr. Corin to review his notes for the purpose of refreshment of recollection.

Mr. Corin declines to review his notes for refreshment of recollection because under the Florida Rules of Evidence if someone uses documents or items for refreshing their recollection, their counsel has the right to review the notes and inspect them and to examine the witness upon the items produced for the purpose of refreshment of recollection, which would circumvent the basis of this witness' declination to answer the question. Therefore, I would recognize that I would instruct him to review his notes and also recognize that he declines to review his notes for the same purpose.

MR. HANKINSON: Okay.

THE COURT: Is that correct, Mr. Corin?

THE WITNESS: Yes, Your Honor.

[51] BY MR. HANKINSON:

Q Did you form a strategy in how to approach the homicide case, the trial of the homicide case?

A Yes.

Q Okay. What was the strategy you decided to adopt in this case?

A I was trying to save Mr. Nixon's life.

Q And how did you decide to try to go about that?

MR. STRICKLAND: Your Honor, I would object as to that. That calls into play the four or five different objections that I brought into play and I object on all of those bases.

THE COURT: I'm going to overrule the objection, request the witness to answer that question and honoring his declination not to breach confidentiality, but I think it calls upon him to outline how he proposed to implement that strategy, which at this point would not be work product because the case has been concluded.

THE WITNESS: I think the best evidence of what I did in the case is a matter of record.

BY MR. HANKINSON:

Q Well, I would like for you to explain that to us just a little bit.

A Well, I don't understand.

You were at the trial. You know exactly what [52] happened.

Q Right. But, the Supreme Court was not there and I think one of the considerations is what is your strategy. So, I would like to have you elaborate, basically, what your strategy was.

A Well, I did not emphasize the guilt phase of the trial. My emphasis was on the penalty phase.

Q I'm sorry. I didn't hear what you said.

A My emphasis was on the penalty phase.

Q And how did you go about not – what was the word you said as to the guilt phase – not –

A Emphasis.

Q Okay. How did you go about trying to lessen the emphasis of the guilt phase.

A By, essentially, not contesting the State's case.

Q Okay. And how did you feel that that was advantageous to your client?

MR. STRICKLAND: Your Honor, I would renew my continuing objection on that. That is way past the scope of what we are here for. It's way past Turner.

THE COURT: Overruled.

THE WITNESS: I decline to answer that question.

MR. MARKY: Your Honor, I didn't hear the witness.

THE COURT: Rephrase that question specifically. I did not detect any area of breaching confidentiality in [53] that, as I heard the question. But, I would like you to rephrase it to make sure I understand it.

BY MR. HANKINSON:

Q You indicated that you had formed a strategy not to emphasize the guilt phase, and you did that by not contesting the witnesses. And my question was, how did you feel that was advantageous to your client, Mr. Nixon?

A I really don't know how to answer that question.

Q Well, you formed a strategy, correct, not to emphasize the guilt phase?

A Well, you – that is what I did, that is correct.

Q Okay. Why did you decide to do that?

A Because, in my opinion, there was not going to be any question but that, based on the State's evidence, the jury was going to find that Mr. Nixon had done what he was accused of doing.

Q I'm sorry. You kind of tailed off at the end.

A Because, in my opinion, based on the State's evidence, the jury was going to find that Mr. Nixon had done what the State accused him of doing.

Q Did you discuss your decision as to the guilt-innocence phase, of how you were going to approach that, did you discuss that with anyone else, such as other attorneys, other investigators, or –

A Your Honor, I would decline to answer that question [54] based on privilege and attorney work product.

THE COURT: Overruled.

THE WITNESS: The answer to your question is, yes, probably so.

BY MR HANKINSON:

Q Do you recall who you discussed it with?

A No, I do not.

Q Other people in your office?

A Perhaps.

Q Do you recall any one of the people that you discussed it with?

A Not specifically.

Q Is it common in your office, when serious case of this nature is pending, for the attorneys to more or less discuss strategy, how to approach the case?

A It is done. As to whether it's common practice, I can't say.

Q Now, what was your strategy in the penalty phase?

A I don't understand. I tried to have the jury be convinced to recommend a life sentence. That was my strategy.

Q Okay. But you said you tried – that was the end result that you wanted, and you tried to do that first in the guilt phase by not emphasizing the guilt phase?

A . Well, I don't know that I tried to get them to spare his life in the guilt phase. We hadn't even gotten to the [55] penalty phase yes.

Q My question is, what did you do in the penalty phase, what was your strategy in the penalty phase, to get the jury to spare his life?

A To advance to the jury matters that they would find mitigating.

Q What matters did you present that you considered to be possible mitigation?

A As I recall, there was a lot of prior records from training schools, HRS, Department of Corrections, psychological reports, matters that showed that very early on that Mr. Nixon had a problem and that that problem was never dealt with successfully.

Q Okay. So, was that your basic – what you were trying to convince the jury of?

You just elaborated that he had long-time problem that was never dealt with.

A Right.

Q Anything else that you were trying to convey to the jury?

A Can you be more specific?

Q Well, I'm just trying to say, were there any other points you were trying to get across to the jury other than the fact of this longstanding problem that was not dealt with in mitigation?

[56]A Do you have something – I'm trying to recall specifically what may have been introduced. And I think there would have been a prior – prior to the homicide, there was a phone call from Mr. Nixon I think to the sheriff where he tried to get them to come pick him up because he felt like there was a problem, and the officers declined to do that

Q Did you try to advance to the jury any problems that he had with his girlfriend, Wanda Robinson?

A I may have. I'm not specifically recalling.

Again, you probably reviewed the transcript, and I have not.

Q Okay. Did you present any psychological or psychiatric testimony to the jury?

A As I recall, I did.

Q And for what purpose were they presented?

A Mitigation.

Q Do you recall what point mitigation [sic] you were trying to advance?

A Mental difficulty, emotional difficulty.

Q Okay. I believe you previously testified on December 19th that you met and discussed your possible strategy with Mr. Nixon on at least three times.

A If that is what I testified then, that is the best of my recollection.

Q Did you keep any notes of these meetings?

[57]A Again, I have already answered that question.

Q No, I don't believe you have.

Did you keep any notes of specifically your meetings to discuss strategy in the homicide case with Mr. Nixon?

A I think you asked me if I kept notes of my contacts with Mr. Nixon. And I think I answered that I did.

Q Okay. Now, I'm asking an even more specific question as to those notes. Did you keep notes about meetings with Mr. Nixon where you discussed strategy?

A I may have notations to that effect.

Q And do you have those notes with you?

A I may.

MR. HANKINSON: Again, Your Honor, I would ask that those notes be produced.

THE WITNESS: Again, Your Honor, I decline.

THE COURT: Same ruling.

BY MR. HANKINSON:

Q Assuming that we were allowed to have those notes and have Mr. Corin review those notes, I would then ask him to elicit exactly what was said in those notes and to relate to us exactly what he told Mr. Nixon about strategy, having refreshed his recollection with his notes.

A Of course, I would decline.

MR. STRICKLAND: Of course, I would object, Your Honor, based on scope of proceedings, waiver, Turner, and [58] the attorney-client privilege.

THE COURT: Overruled.

BY MR. HANKINSON:

Q Do you recall what you told Mr. Nixon in reference to the strategy in the homicide case?

A I decline to answer that question.

Q Have you had a chance to –

THE COURT: That particular question I would require the witness to respond to, in that it does not call for any violation of any confidence at all. If I heard the question correctly, it was just simply "do you recall?"

MR. STRICKLAND: Your Honor, could I hear the question again, please?

THE COURT: Madam Court Reporter, would you read the question?

(WHEREUPON, THE COURT REPORTER REPEATED THE PENDING QUESTION)

THE COURT: The exact question is simply one that asks the present state of his recollection. It does not require that he reiterate the statement, comment on it at all. It's simply "do you recall."

He is going to decline to answer what it was. But, at least it can be asked does he even recall what he said. And I would require that the witness respond to that question in the context it was posed in.

[59] THE WITNESS: As to that question, I would say I don't now specifically recall.

BY MR. HANKINSON:

Q Do you recall the essence of what you told Mr. Nixon?

A Not specifically at this time.

Q Well, I'm not asking if you remember specifically word for word. Do you remember essentially what you told him about the strategy you were going to employ?

A Ask the question again, please?

Q You said you did not specifically remember what you said to Mr. Nixon. Let me clarify my question just a little bit.

Do you remember, in a general sense, what you told Mr. Nixon about the strategy that you intended to employ?

A Yes.

Q And, to reiterate, it's possible that you have notes to that effect?

A It's possible.

Q What did you tell him?

A I decline to answer that question.

Q How did he react to what you told him?

A I decline to answer that question.

Q Did he appear to understand what you told him?

A I decline to answer that question.

Q Did you explain to him what you were planning to do [60] in clear and concise language so he could understand?

A I decline to answer that question.

Q Did you ever get any reaction from him?

A I decline to answer that question.

Q How did you take this lack of reaction from him?

I'm assuming that, consistent with the prior testimony, he would tell us he got no reaction.

A You answered your own question at the end of the question.

Just rephrase it. Just state your question again.

Q I was clarifying for the record. We have prior testimony where you indicated that Mr. Nixon did not react to what you told him. You have already testified to that.

A In the December 19th testimony.

Q Any my question was, how did you take his lack of reaction?

A I don't know how to answer that question.

Q . Well, let me clarify a little bit.

Did you take his lack of reaction as him not understanding what you told him?

A I would decline to answer that question.

Q Did you take his lack of reaction as simply a negative reaction to having told him that he inevitably was going to be convicted?

[61]A I would decline to answer that question.

Q During the trial, did you talk with Mr. Nixon?

A Define "trial."

Q The trial of the homicide case. From when we first started jury selection until the penalty phase was over, did you consult with Mr. Nixon at all?

A Yes, I probably did.

Q Do you recall approximately how many times you talked with him.

A No, I do not.

Q Would you have any notes of conversations with Mr. Nixon during the trial?

A I may.

MR. HANKINSON: Again, I would ask, Your Honor, that he produce those notes.

THE WITNESS: I would decline.

THE COURT: Require that they be produced.

BY MR. HANKINSON:

Q Did Mr. Nixon remain with you in the courtroom during the course of the trial?

A No, sir.

Q What level of cooperation did you get from Mr. Nixon during the trial of the homicide case?

THE COURT: Just a moment.

I am not comfortable with that response. I think [62] that Mr. Nixon did remain with counsel through the earlier stages, very early stages, at which time he voluntarily absented himself.

From a cold record review several steps up, that could be inferred that he did not even attend the trial.

THE WITNESS: Would the court reporter repeat the specific question? I thought he said throughout trial.

THE COURT: No.

BY MR. HANKINSON:

Q No. I think I asked did he – I may have said that. I may have said did he remain with you during the course of the trial, and you indicated no. Perhaps we should clarify that.

Was Mr. Nixon present at the trial in person when the trial began, when jury selection began?

A Well, again, I – as I recall, he was when jury selection began.

Again; you have the record and the record will show when he was and wasn't there. I don't have that record and I don't presently, independently recall when he was specifically there and when he was not specifically there.

Q But, you do recall that during some parts of the trial he was present and other parts of the trial he was not present?

A Yes.

Q Did you have any discussion with Mr. Nixon as to [63] whether it was advantageous or disadvantageous to him for him to attend the trial?

A I would decline to answer that question.

Q What level of cooperation did you get from Mr. Nixon during the course of the homicide trial?

A I would decline to answer that question.

Q Did he ever give you any directions as to how he wanted you to conduct the trial?

A I would decline to answer that question.

Q Did he ever make any objection to how you told him you intended to approach the trial?

A I would decline to answer that question.

A I would decline to answer that question.

Q Did you give him the opportunity to object to what you intended to do?

A I would decline to answer that question.

Q Did you give him the opportunity to make suggestions about the strategy of the trial?

A Decline to answer that question.

Q Did you want his input in how to proceed in the trial?

A Yes.

Q Before you went to trial, did you pursue plea negotiations with the State?

A Yes.

Q How did you go about doing this?

[64]A I requested negotiations.

Q And basically, who were you negotiating with?

A My last recollection is Mr. Guarisco.

Q Okay. What did you offer to plead to?

A Probably offered to plead no contest or guilty to all offenses charged for all day.

Q I'm sorry. The last part of that was what?

A Vernacular. Plead to everything for all day, meaning no release.

Do you want to know what the answer was?

Q . Yes.

A "Let's roll the dice."

Q Now, why did you offer to plead your client to life in prison?

A Considering the alternative, it would have been a righteous result.

Q Did you ever discuss these negotiations with your client, Mr. Nixon?

A Decline to answer that.

Q Did he make any comments?

A Decline to answer that.

Q How did the Defendant not attending parts of the trial impact on your ability to consult with him?

A Well, I can't consult with you, Mr. Hankinson, if you are not in the room, can I?

[65]Q So, it had a negative impact on your ability to consult with him?

A Well, I was unable to consult with my client if my client was not physically present.

Q Did you ask the Defendant to attend trial?

A Decline to answer that.

Q What did he tell you when you asked him, assuming that you asked him to attend?

A Decline to answer that question.

Q Did you consider the possibility – in the guilt phase, we have discussed your strategy. Did you consider the possibility of presenting various defenses, specifically, denial of the offense or affirmative defense or a reasonable doubt defense or some type of insanity defense?

A I probably considered everything.

Q And why did you choose not to pursue any of those strategies?

A Decline to answer that question.

MR. HANKINSON: I think that calls not for consultation with his client, Your Honor, but why he chose to take a particular course. I fail to see how that impinges on the attorney-client privilege.

MR. STRICKLAND: Your Honor, it clearly does. We don't know the answer, but there are a number of ways he could reach his conclusion – work product, discussions [66] with his client. There is no telling what it might involve, but certainly Mr. Corin has already made the declination, so his reasons are based on attorney-client privilege.

THE COURT: Overrule the objection, require that the witness answer the question.

He, nonetheless, declines to answer it.

BY MR. HANKINSON:

Q Did you consider that it enhanced your credibility with the jury to not contest guilt in this case?

A I really can't specifically answer that question. I mean, I know what you are getting at. There are theories that go both ways.

I generally take no position on the credibility of lawyers.

Q Do you think the credibility of the lawyer with the jury – maybe I wasn't specific enough – is an important factor during the trial?

A There are those that believe that it is.

Q Do you hold that belief?

A Well, let's just say I would not want to ever do anything in front of a jury which would damage my credibility in terms of misleading them or causing them to arrive at a result through tainted evidence.

I don't know what – I think I know what you are [67] getting at in terms of there are people who believe that the credibility of a lawyer can be destroyed if an affirmative defense is advanced and rejected at the guilt phase; and, thus, they want to bring in another lawyer at the penalty phase.

I am not one who believes that, if that is your question.

Q Okay. Do you think that it would have been disadvantageous to your standing with the jury for you to have said in the guilt phase that Mr. Nixon was not guilty, to assert that to the jury?

A I'm not sure.

Q In adopting the strategy that you took in this case, did you consider the fact that others might later second-guess your strategy?

THE COURT: Excuse me, Mr. Hankinson.

The order of the Supreme Court did give the Court leave to inquire. And I take it that you are leaving what you consider to be the credibility position.

MR. HANKINSON: Certainly, Your Honor.

EXAMINATION

BY THE COURT:

Q I think I understand perhaps part of your comment about the efficacy of a lawyer's credibility with the jury. You commented that the lawyer's responsibility is not to mislead the jury by artifice, trick, false inference, and the like.

[68] There is one school of thought, which I recognize differences of opinion, that deals with the credibility of the lawyer in what I might call a personality context, and that is that the jury will see an individual attorney somehow in a light that if the individual attorney posits a position, it must be true or viable because he or she is the one who said it and we know that he or she would not posit that position because they are paragons of integrity.

There is another facet of that. If I recall correctly, and if I heard you correctly, part of your earlier testimony was that you did not give emphasis to the guilty or not guilty phase of the case, in part because your strategic objective was to save Mr. Nixon's life and that that issue would be met during the penalty phase and that your overall approach in the penalty phase, or part of that approach, was that Mr. Nixon, in part, had been shaped by the society in which he lives, which includes all of us, that help had not been extended to him at times when help could have been extended, that there were not corrective or remedial increments that were put into place and, therefore, find those to be mitigating factors with the result of a remedy for a life sentence instead of the electric chair.

I might have taken some license with that. But, to [69] some degree, is that not relatively correct?

A I don't know.

Q Assuming that you don't know, but pursuing that further, you did intend to de-emphasize the guilty or not guilty phase so that you could stress the mitigating factors that you perceived possibly available to you in the penalty phase?

A I don't think that is quite correct.

Q What would be quite correct?

A I try not to assess the guilt or innocence of any client. That is not my job. I am not stupid as either a lawyer or human being, so I must assess the status of a given client's case based upon what I know to be admissible facts from the prosecution.

So, to the extent that de-emphasis of the guilt phase would assist in minimizing those facts which might inure to the benefit of my client at the penalty phase of the trial, that is what I tried to do.

Q Now, I think the end line of where I was going in the context of credibility was not so much believability, but the objective of not having a jury have a dissident reaction to the penalty phase presentation, at least retaining some receptivity to the position that you were positing.

A Well, but, see, I don't think that really is – in any given case, the evidence can be so structured that [70] regardless of what the lawyer may or may not do at any stage, is not going to change the jury recommendation.

So, it's not the – it's hard to say it's not whether you defend the guilt phase and the jury says, well, we don't buy that, so we are not going to listen to a thing he says. That is not the whole of the story.

Let me give you – I'm trying to – let me give you a for instance.

Q Okay.

A The way I generally have defended cases since I have been a defense lawyer is that less is more, and that when I am attempting to defend any case, when I stand to say something in front of the jury, I want them to pay attention to me. Thus, I don't hop up and down, as a general rule, if I know that my objection is going to be overruled, or is otherwise quasi-frivolous. I don't ask questions on cross-examination generally if I don't have a purpose because when I talk, I want them to listen and I don't want them to say, here comes that jack-in-the-box again. So, to that extent, if that enhances somebody's credibility, so be it.

If it does not, so be it.

Q Looking at it from two different facets, one would be the lawyer's credibility, perhaps vis-a-vis a jury's receptivity to whatever position the lawyer may be positing, and how do you keep them receptive. I perceive that your [71] strategic thrust on this case, as you evaluated it, was in the penalty phase with the strategic position of keeping Mr. Nixon out of the electric chair. How you prefaced the presentation so that at least they may or may not be receptive in the penalty phase has to be a factor for consideration.

A Right.

THE COURT: Okay.

CONTINUED DIRECT EXAMINATION

BY MR. HANKINSON:

Q May I go back just a little bit further on that point, if I could.

I would like to refer the witnesses, if I may approach the witness – show you part of the transcript. I'm on page 1038, Lines 18 through 23.

May I approach the witness?

THE COURT: You may.

BY MR. HANKINSON:

Q I represent to you this is part of your closing argument in the penalty phase. I am referring to this paragraph starting out, "Now, today it's Thursday."

Would you just read that paragraph for us, please, at this point?

A Just the next to last paragraph on Page –

Q Right. Starting out "Today is Thursday."

A "Now, today is Thursday. The trial has lasted about [72] a week. All I have ever asked of you is to keep your mind open. I never asked more than that. I promised you I would not try to misrepresent anything to you and I think I have, to the best of my ability, kept that promise."

Q Now, you made a point there that you had promised not to misrepresent anything to them. Did you consider that to be an important part of your strategy in this case?

A I think that is an important consideration in any case.

Q Did you feel that the strategy that you took emphasized your ability to be able to make that type of statement to the jury?

A Not necessarily.

Q Okay. Explain that.

A Well, I mean, I don't ever intentionally misrepresent anything. And I think I try to use that to my advantage, if I can, in any case.

MR. HANKINSON: I'm going to move on unless you have further questions in that area.

THE COURT: No.

BY MR. HANKINSON:

Q As you tried this case, the homicide case, did you consider the fact that others might later second-guess your strategy?

A Yes, sir.

[73]Q Do you think lawyers should make strategic decisions based on what other may later say about their strategic decisions?

A No, sir.

Q Did you employ what you believed to be at the time the best possible strategy for representing this Defendant, Mr. Nixon?

MR. STRICKLAND: Your Honor, I would object on that question. There is a lot of components that may enter into that, including confidential communications with Mr. Nixon.

THE COURT: Overruled.

THE WITNESS: I decline to answer.

MR. HANKINSON: I mean, Judge, that question has nothing whatsoever to do with attorney-client privilege.

THE COURT: Just a moment.

In the context of the preceding questions, and that is that lawyers do not make strategic decisions based on what others – and that is very broad – others may think about the soundness or the wisdom of that decision, Mr. Corin has answered that, and I think correctly, no, and that you make those decisions professionally at the time based on what is presented to you professionally, without regard to what others may think about it, quite frankly at the time or what they might think about it later.

[74] In that context, I think you have asked Mr. – or if I understand it, you have asked Mr. Corin, in retrospect, do you think that was the appropriate strategic position.

In essence, that is what I perceived it to be.

In that context, I would overrule the objection.

MR. HANKINSON: My question was not in retrospect. My question was, did he employ what he believed to be the best possible strategy at the time even given those considerations that I mentioned, which he has asserted to, that he might be second-guessed. And I think it's a perfectly appropriate question consistent with what you have said.

THE WITNESS: I decline to answer the question.

MR. HANKINSON: On the basis of attorney-client privilege?

THE WITNESS: Yes, sir.

MR. HANKINSON: I would like to have a ruling of the Court whether that –

THE COURT: I think his response to the question that you have outlined is consistent with his prior recollection.

The basis of that ruling, Mr. Hankinson, is that if your question is, in retrospect, considering what everyone else has said, does he have second thoughts about it, and that implies that he has considered legal issues that are presently before the Court, both at this level and above, [75] I would accept his declination. I will under the ruling request and instruct him to answer.

If your question is, regardless of whether anyone has said anything about it or second-guessed, does he look back and consider his strategy to have been sound, that does not take into account what other people may think or may not think, but his own subjective consideration, I would say that falls outside the attorney-client privilege and instruct the witness to answer.

MR. HANKINSON: I'm sorry?

THE COURT: Go which way you want to go.

MR. HANKINSON: That's all the questions I have at this time, Your Honor.

THE COURT: Cross, Mr. Strickland?

MR. STRICKLAND: No. Thank you, Your Honor.

THE COURT: Thank you, Mr. Corin.

THE WITNESS: Yes, sir.

THE COURT: Are there other witnesses?

MR. HANKINSON: Yes, sir. I would call Tony Guarisco to the stand.

MR. STRICKLAND: Your Honor, I would like to interpose an objection. The objection is that this also – Mr. Guarisco's testimony will be beyond the scope of the three orders that we have indicated and certainly beyond any kind of – anything he may have to say is beyond the [76] parameters that the Court is interested in knowing, particularly in light of the fact that the Court has indicated that the issue is the issue which I raised in the Supreme Court, which had to do with the matter which is a part of the record and the protective order which I referred to this morning.

THE COURT: Overruled.

Swear the witness, Mr. Clerk.

(WHEREUPON, THE WITNESS WAS SWORN BY THE CLERK)

MR. STRICKLAND: Your Honor, I want to make it quite clear the nature of my objection. The objection is that the issue raised on appeal was brought pursuant to U.S. vs. Cronic, is not ineffective assistance of counsel brought pursuant to 3.850. It is exclusively the issue, which the Court is well aware of, that I brought to the Supreme Court. Anything that Mr. Guarisco may have to say clearly goes beyond the three issues, which I won't go over, but are found in the February 1st, 1989 order, which the Court is aware of.

On that basis, we would object.

Thank you, Your Honor.

MR. HANKINSON: I have no objection to that being a continuing objection, Your Honor.

THE COURT: Well, it would have to be a continuing objection because I haven't heard any of the questions [77] that have been asked and I don't know whether they do or not. For all I know, Mr. Guarisco's testimony may be, I talked to Mr. Corin, Mr. Corin told me he had talked with Mr. Nixon and Mr. Nixon said A, B, C, D and E.

MR. STRICKLAND: Well, Your Honor, it is a continuing objection. But, I will object periodically if the Court – I can just indicate my objection and the Court notes those are my objections.

THE COURT: Certainly. That is your objection and at the time you wish to interpose it, just simply rise and note the continuing, previously stated objected.

MR. STRICKLAND: Thank you, Your Honor.

THE COURT: All right. Mr. Hankinson?

MR. MARKY: The Court overruled the objection, Your Honor?

THE COURT: The Court is not ruling on the objection because I don't have anything to rule on.

MR. STRICKLAND: Actually, Your Honor, it's also the calling of Mr. Guarisco.

THE COURT: Well, the Supreme Court's order, the last one, authorized the State to call witnesses. They are calling a witness. I don't know what the witness is going to say. I don't know whether the witness is going to discuss the weather or this case. So, I don't – I understand your objection. I am just saying I have nothing to [78] apply the objection to.

MR. STRICKLAND: Thank you, Your Honor.

THE COURT: He hasn't even been asked his name yet.

MR. STRICKLAND: Thank you, Your Honor.

MR. HANKINSON: We will take are of that problem, Your Honor.

THE COURT: Good.

WHEREUPON,

ANTHONY GUARISCO

was called as a witness, having first been duly sworn to speak the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HANKINSON:

Q Would you state your name, please?

A Anthony Guarisco.

Q And how are you currently employed?

A I am the Deputy State Attorney, Second Judicial Circuit.

Q What does it mean to say that you are Deputy State Attorney?

A I am, in essence, the chief assistant in charge of operations.

Q So, you are the second-in-command of the office?

A Right.

[79]Q Tell us, if you would, just briefly, first, your educational background.

A I received a Bachelor's degree from the University of Tampa. I received a juris doctorate degree from South Texas College of Law.

Q When was that?

A 1970. And the Bachelor's degree in 1967.

I have attended numerous courses of the National School of Prosecutors and also the Florida Prosecutors Association, including the Career Prosecutor's Course and the Executor Prosecutor's Court.

Q Okay. If you would, since your graduation from law school, if you would just briefly run through were [sic] you worked, what your position was.

A In 1970 to '71, I was with the legal staff of the State Treasurer's Office.

Between 1971 and 1974, I was Assistant State Attorney here in the Second Judicial Circuit.

From 1974 to 1981, I was an Assistant State Attorney in the Thirteenth Judicial Circuit and also Special Prosecutions Bureau Chief.

From 1981 to 1983, I was Deputy State Attorney here in the Second Judicial Circuit.

From 1983 to 1985, I was Chief Assistant State Attorney in the Thirteenth Judicial Circuit.

[80] And, of course, from 1985 to present, Deputy State Attorney here in the Second Judicial Circuit.

Q The Thirteenth Circuit, that is Tampa?

A That is Tampa.

Q Okay. During the course of your involvement as a prosecutor since 1971, have you had occasion to participate in the trial of any capital cases?

A I have tried in my career about 15 capital cases, actual trials.

Q Have you had other involvement in other homicide cases in the offices?

A Well, I have presented a great number of capital cases to the grand jury, in particular in Tampa, and also participated in investigations of homicide cases while in Tampa.

Also, in the capacity as Chief Assistant, Deputy State Attorney, I have counseled with attorneys concerning capital cases that they are handling.

Q Can you in any way estimate the number of homicide cases that you have been involved in to the extent that you are aware of the factual matters and had some participation in their presentation?

A That would be a hard question for me to answer because, I mean, we are talking about great numbers, in particular down in Tampa.

[81]Q Now, you were one of the Prosecutors assigned to handle the State vs. Joe Nixon case; is that correct?

A That is correct.

Q And you were one of the trial attorneys?

A That is correct.

Q If you would, relate to us, please, how you viewed the strength of this particular case?

MR. STRICKLAND: Your Honor, with that, I would interpose my objection.

THE COURT: Overruled.

MR. STRICKLAND: Thank you, Your Honor.

THE WITNESS: Okay. This is probably one of the cases in my career that I believe was really tight. It had just about everything that a prosecutor could dream of as far as evidence.

There was overwhelming evidence in this case. The Defendant's background – as far as being a death penalty case, not only did we have overwhelming evidence, we also had a Defendant's background to consider and the innocence of the victim and the gruesomeness of the case. So, this was a very, very strong case evidentially.

I mean, in this particular case, we had the Defendant being seen with the victim prior to the murder, we had the Defendant being seen after the murder driving the victim's automobile, we had the Defendant's finger-[82]prints on the victim's automobile, we had the Defendant making statements to numerous individuals, including a long confession to law

enforcement, we had him identified, in essence, pawning the ring that was taken from the victim.

It was just overwhelming.

BY MR. HANKINSON:

Q Were they any plea negotiations in this case?

A Yes. Mr. Corin approached me –

MR. STRICKLAND: Your Honor, I would at this time on this – I think we have a steady line of questions that are coming and I would like to note particularly at this time a continuing objection based on the previous objection made.

THE COURT: Overruled.

BY MR. HANKINSON:

Q Did you have any plea discussions in this case?

A Yes, I did.

Q Who were those with?

A They were with Mr. Corin, who was at that time representing Mr. Nixon.

Q Relate to the Court, please, what the nature of the plea discussions were.

A In essence, Mr. Corin offered to plead to everything as charged. The only thing was to spare Mr. Nixon from the [83] death penalty. He would plead to first-degree murder for minimum mandatory 25 years, and, in essence, said that we could ask for the moon as far as other charges, we could

habitualize him, we could seek the maximum sentence on the other charges.

Q And did you agree to enter into that plea?

A At that time, of course, I told him that I would discuss it with you. And then we had another discussion wherein he again made the offer and I, as usual when I'm discussing these matters with defense counsel, asked how his client felt about it. And he indicated that his client would –

MR. STRICKLAND: I object to that, Your Honor.

THE WITNESS: – plead.

THE COURT: Overruled.

MR. STRICKLAND: Your Honor, that calls for him to be testifying as to what somebody else said.

THE COURT: I understand that.

MR. STRICKLAND: Thank you, Your Honor.

MR. HANKINSON: I don't know whether the court reporter was able to get his answer. It was kind of simultaneous with the objection.

Do I need to repeat that, Your Honor, the end of his answer?

THE COURT: I heard it.

MR. HANKINSON: If you got it and the court reporter [84] got it down, fine.

Basically, he indicated that his client agreed to do this?

THE WITNESS: Yes.

BY MR. HANKINSON:

Q What was your decision as to whether to enter into the plea as proposed by Mr. Corin?

A My decision was that we would not accept his plea offer, that due to the overwhelming evidence of this case and the severity of this case, that this was a death penalty case and that we would proceed accordingly and go to trial, seek a conviction, and if the jury convicted and Defendant then we would seek the death penalty.

Q Now, I believe you indicated that you were one of the Prosecutors that actually tried this case; correct?

A That is correct.

Q And we have heard testimony somewhat today, and more so back on December 19th, about the strategy employed by Mr. Corin not to cross-examine the witnesses or contest the State's evidence. Is that your recollection of basically how Mr. Corin approached the guilt phase?

A Yes.

Q As a Prosecutor of the case, did that cause you any strategic problems or concerns?

A Well, when that happened in the courtroom, of course, [85] many thoughts ran through my mind. This is, in essence, the first time that I have ever personally witnessed this in a trial. Many questions run through your mind, such as how is the jury going to look at us proceeding with our case and presenting all the evidence that we had to present, will the jury think that we are going to be engaging in overkill. And people

might say, or the jury might say, why are you presenting all this evidence when the Defense attorney, in essence, said there would be no doubt in this case.

There was a lot of evidence that we had. And we had to decide how much of this evidence do we put in because we were obligated – Mr. Corin's statement, if I recall, at the beginning was there would be no doubt that the State would prove the case, which meant that we still had to prove the case. So, that meant we had to prove the elements of all the charges in the indictment. So, we had to present evidence and we also had to take into consideration that the evidence that we presented in trial would also be used in a subsequent proceeding, the penalty proceeding dealing with the establishment of certain aggravating circumstances that we would advance to the jury. And, in essence, what we had was a low-key defense presented by Mr. Corin, and so we had to be very cautious as to how we proceeded. And we didn't want to be overly dramatic and we also had to be very careful in our presentation of the case as to whether or not we would get involved in creating any [86] error in the record.

So, all of these things ran through my mind and, of course, we had discussions of it as we proceeded.

Q Okay. Based on this low-key approach that you talked about by Mr. Corin, did you may any adjustments in how the evidence was presented to the jury?

A Well, obviously we had to present our evidence. And the evidence that we presented, of course, was not a pretty picture. However, there were a number of witnesses that had relevant information that could have testified at trial that we chose not to put on. And, also, there were witnesses that we did put on that we could have gotten a lot more evidence out of and we chose not to go any further but just to establish certain basic facts to help prove our elements of the offenses.

Q Do you recall any specific testimony that was not offered during the guilty-innocence phase that you considered to be particularly relevant evidence but, for strategic reasons, was not called during that time?

A Well, we had a number of witnesses to whom Mr. Nixon made statements. We also had another law enforcement officer aside from the ones that he gave the confession to. We had Detective Livings that had a very incriminating statement taken from the Defendant that we chose not to introduce in the guilt phase of the trial. And that was the Defendant's statement that he removed the victim's underwear or panties to [87] terrorize her. That, of course, would have been, in our consideration, a very dramatic thing to present that we chose not to present in the guilt phase and later on, of course, presented it in the penalty phase.

There was a witness by the name of Evelyn Harris. She was put on to testify about seeing the Defendant in the victim's car. However, she could also have testified about the statements that the Defendant made to her that he had killed a white woman, which was I believe through a phone conversation that she had with the Defendant, who was then incarcerated.

Virginia Meeks could have been called regarding seeing the Defendant in the victim's car. And the Defendant showed her the rings that he took, he said "From his girlfriend." She was not put on.

She could have also identified the ring. And these rings that I'm talking about were the rings of the victim.

Judith Hill wasn't called. She could have testified about, again, seeing the Defendant in the victim's car.

JoAnn Plachy, who was a very close friend of the victim, who knew her very well, who knew her jewelry, and she knew

the jewelry the Defendant had, knew the car and so forth, she could have been put on to identify the automobile that belonged to the victim, which the Defendant was driving. She could have been put on to identify the rings that belonged to [88] the victim, which the Defendant pawned. She could have been put on to identify a picture or a photograph of the victim prior to the murder.

Also, there was a key found in a burned pile at the crime scene, in the vicinity of where the victim was tied up and burned. That key belonged to Ms. Plachy. It was, I believe, a key to her residence. And that evidence could have been presented and was not.

Q Okay. About Mrs. Plachy, how would you have – talking about the type of testimony this would have been, in terms of low-key, emotional. What kind of testimony would we have gotten from Mrs. Plachy in identifying the victim and identifying these other items?

A It would have been very emotional. She was very close to the victim and very emotional over this situation.

THE COURT: Mr. Strickland?

MR. STRICKLAND: We kind of – Mr. Hankinson's movement is drifting into –

THE COURT: I'm going to admonish counsel. I think I have heard enough about the State's case.

I'm curious about the facet of the State's case in light of the manner in which the defense case was conducted.

MR. HANKINSON: What I think Mr. Guarisco indicated is that these were adjustments that were made in the case [89] partially as a result of this strategy, as I understood it.

THE COURT: No problem that you have outlined that. I'm just saying let's move along.

MR. HANKINSON: Okay. We are almost through, as a matter of fact.

THE COURT: No, we are through.

MR. HANKINSON: Okay.

MR. STRICKLAND: Thank you, Your Honor.

BY MR. HANKINSON:

Q So, basically, these are adjustments that had to be made in the case based on the Defense's strategy?

A Yes, sir.

MR. HANKINSON: Those are all the questions I have, Your Honor.

THE COURT: Mr. Strickland?

MR. STRICKLAND: No. Thank you, Your Honor.

THE COURT: You may step down.

You have an additional witness, I see, in the form of Mr Simpson.

MR. HANKINSON: Yes, sir.

Mr. Marky has an agonized look on his face and asks that we take five minutes.

MR. STRICKLAND: I would stipulate to it.

THE COURT: How long do you expect Mr. Simpson's testimony will be?

[90] MR. HANKINSON: About 30 minutes.

THE COURT: All right. Let's take about a – I would guess it would take five minutes.

(WHEREUPON, A BRIEF RECESS WAS HELD)

THE COURT: Am I correct the State now intends to call Mr. Simpson as an expert witness in the field of effective assistance of counsel?

MR. HANKINSON: That is correct, Your Honor.

THE COURT: Mr. Strickland objects?

MR. STRICKLAND: Yes, Your Honor, I object. As I indicated, this goes beyond the Cronic issues, beyond the scope of the proceedings, beyond the issues I raised at the Supreme Court, has no relevancy on those bases, no relevancy to either the orders, the limited orders, the three issues the Court has raised in its February 1st, 1989 order and my issue on direct appeal.

Thank you, Your Honor.

THE COURT: All right. Overruled.

Mr. Clerk, swear the witness.

(WITNESS SWORN)

MR. STRICKLAND: Your Honor, if I could note that as a continuing objection. I would object to all – since the Court has indicated and the State has – the State rather has indicated that it's for the purpose of expert testimony, I would object on

those bases as a continuing [91] matter. Would the Court note that on each and every question that he asks in that regard?

THE COURT: So noted.

MR. STRICKLAND: Thank you, Your Honor.

THE COURT: All right. You may proceed.

WHEREUPON,

LARRY SIMPSON

was called as a witness, having first been duly sworn to speak the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HANKINSON:

Q State your name, please.

A My name is Larry Simpson.

Q And if you would, Mr. Simpson, give us a brief outline of your educational background.

A I attended undergraduate school at Florida State University and graduated in 1971 with a BS degree. I then attended Florida State University College of Law. I graduated in December of 1973 with a juris doctorate degree with high honors.

Q After finishing law school, set out for us your legal background.

A My employment has basically consisted of two positions. The first position that I held was that of an [92] Assistant State Attorney in the Second Judicial Circuit. I went to work with the State Attorney's office on January 2nd, 1974, and continued in that employment until May 31, 1980, at which time I went into private practice with a law firm that at that time was known and Davis and Judkins. And I have been with that firm ever since June 1st of 1980. It is now known as Davis, Judkins and Simpson.

Q All right. As a prosecutor, outline to us, if you would, the types of cases that you have handled.

A I handled every conceivable case there was to handle at the trial court level, everything from juvenile, traffic court cases. I have tried jury trials involving what is now traffic infractions. I have tried juvenile hearings. I have tried competency proceedings, Baker Acts. I have tried misdemeanor cases, routine traffic court cases. I have tried minor felonies and major felonies, several homicide-type cases.

At the time I left the State Attorney's office in May of 1980, I was in charge of the Career Criminal Unit and was also handling special prosecutions, having been appointed by the Governor's Office to handle special prosecutions in other circuits throughout the state.

Q During your time as a prosecutor, you indicated you handled trials. Approximately how many trials did you indicate you had handled?

A I cannot even guess. I would have to be somewhere [93] in the range of hundreds.

Q What about capital cases as a prosecutor?

A As a prosecutor, I actually had two first-degree murder cases that went to a penalty phase. I handled many first-degree murder cases that, for one reason or the other, did not actually reach the penalty phase.

Q But, how many that actually went to the penalty phase?

A Two.

Q What two cases were those?

A One was the case that arose in Jefferson County. The Defendant's name as [sic] Joe Goodwin. And that ultimately resulted in an [sic] life sentence.

The other case was Theodore Robert Bundy, the Chi Omega homicide case that was transferred from Leon County to Miami, Florida, for the trial, which ultimately resulted in the death penalty.

Q And you were lead counsel in that counsel?

A Yes, I was.

Q Now, you indicated now that you are with a private law firm. What type of practice are you in there?

A I do any kind of trial work, primarily criminal defense work, in either state or federal court, along with the appellate work that goes with unsuccessfully defending criminal cases.

[94]Q How many criminal cases would you estimate you have handled as a defense attorney?

A Again, it would be hundreds. I have tried many of those cases. Most of the ones I would say that I have actually tried since being in private practice have been relatively complex and lengthy trials.

Q Okay. About how many would you say you probably have tried?

A I would say somewhere in the range of about 15 to 20.

Q What about have you handled any capital cases as a defense attorney?

A Yes. None that have reached the penalty phase though.

Q Have you tried several that started out as first-degree murder cases?

A Yes, I have.

Q Do you remember how many?

A I would say approximately three, perhaps four. There was one case where I represented more than one defendant at any particular point in time. The case was actually tried four times.

Q And in each of those, you successfully avoided the penalty phase?

A Yes.

Q What courts are you currently admitted in?

A I'm admitted to practice in all state courts in the [95] State of Florida. I am also admitted to practice before the United States Supreme Court, before the Fifth, Sixth and Eleventh Circuit Court of Appeal, and before the Northern District of Florida.

Q And where have you argued or tried cases?

A I have argue and tried cases all over the State of Florida from Key West to Pensacola to Jacksonville. I have also argued or tried cases in the States of Alabama, Georgia, Virginia, Ohio, and Kentucky.

Q And are you a Board-certified criminal trial lawyer?

A Yes. I am Florida Bar Board-certified in criminal law.

Q What did you have to do to obtain that status?

A I had to submit an application which required proof of the number of cases that I had actually tried and been involved in; in other words, experience in the field of criminal trial law. I also had to establish that I had maintained sufficient continuing legal education during the period that the certification would apply to. And I also had to stand and complete and pass the Criminal Law Certification Examination.

Q Okay. And you did so?

A Yes.

Q How many other private lawyers in Leon County are Board-certified in criminal law?

[96]A I am the only one except for Bob Harper, who is Board-certified as a criminal appeals lawyer. I am the only Board-certified criminal trial lawyer in this county that is in private practice.

Q Have you had an occasion to handle any collateral proceedings, 3.850 proceedings?

A Yes, I have.

Q As a defense attorney?

A Yes.

Q Okay. Where was that?

A I have handled a couple of them. One that comes to mind is one that was handled over in Dixie County, Florida, where there was an allegation of ineffective assistance of counsel.

Q What was the result there?

A The case was reversed on the 3.850 motion and the Defendant was immediately released from prison, with all charges being resolved.

Q Have you done any appellate work relating to 3.850 proceedings?

A Yes, I have.

Q Do you remember how many cases you have been involved in?

A I can recall one that I did appellate work on, but I don't recall any others. I have done many appeals in [97] criminal cases.

Q What is your Martindale-Hubbell rating?

A A-B [sic].

Q Have you taught or lectured any in the field of trial work or criminal law?

A Yes, I have.

Q Where and outline what you have done.

A From 1981 to 1985 I taught as an adjunct professor at the Florida State University College of Law teaching Criminal Clinical Orientation. That is a preparatory course for all law students who intend to intern in either the State Attorney's office or Public Defender's office. It's essentially a criminal trial practice course where the students are taught how to handle criminal cases.

I have also lectured on many, many occasions. I lectured as part of the Florida Bar's continuing legal education program on several occasions. And on one occasion I lectured on prosecuting and defending complex criminal cases.

I have also lectured on two occasions before the American Academy of Forensic Scientists, on one occasion before the Southeastern Association of Forensic Scientists, and various other professional groups including the Florida Prosecuting Attorneys Association. And about three or four months ago I lectured before the California District Attorneys Association in their Homicide Seminar.

[98]Q Are you currently a member in any organization and, if so, any offices held there?

A Bar-related organizations. I am a member of the Florida Bar. And in that capacity, I served from I believe it was 1983 through 1985 on the Grievance Committee of the Second Judicial Circuit, the last year of which I served as Chairman of that committee.

I am also a member of the Tallahassee Bar Association and served as President of that organization during the year 1987.

Q Okay. Are you a member of any defense attorney associations?

A Yes. I'm a member of the American Criminal Defense Lawyers Association. I'm also a member of the Second Circuit Criminal Defense Lawyers Association, as well as the Florida Association of Criminal Defense Lawyers.

Q Based on that, do you receive any legal updates in criminal law?

A Yes. As a matter of fact, probably the best publication that I receive is part of the continuing legal education, and which all lawyers should be involved in, is a publication that is put out by the American Criminal Defense Lawyers Association that is really on the cutting-edge of what the law is right now.

Q So, you keep current in the criminal law area?

[99]A I sure do.

Q Have you ever been retained as an expert witness in a case before this?

A Yes.

Q What kind of case was this?

A I have not yet testified in that case. It is a civil case wherein a lawyer is being sued by his former client on a claim of ineffective assistance of counsel in a criminal case.

Q And who have you been hired by?

A The Plaintiff's attorney is Ed Blanton, and I have been retained by his firm.

MR. HANKINSON: At this time, Your Honor, I would tender Mr. Simpson as an expert in the field of criminal trial practice.

THE COURT: In what field?

MR. HANKINSON: Criminal trial practice.

THE COURT: Mr. Strickland concedes the expertise of the witness in the field, nonetheless, objects to the testimony proffered by this witness; am I correct?

MR. STRICKLAND: I object to his testimony, Your Honor. Thank you.

THE COURT: All right. Accept his credentials in the field of criminal law, am prepared to receive opinions with respect thereto.

BY MR. HANKINSON:

[100]Q Mr. Simpson, at my request, did you do some review of the case before the Court, State of Florida vs. Joe Elton Nixon?

A Yes, sir, I did.

MR. STRICKLAND: Your Honor –

THE COURT: Do you wish to pose your continuing line of objections?

MR. STRICKLAND: My continuing line of objection as I noted prior to the beginning of Mr. Simpson's testimony.

Thank you, Your Honor.

THE COURT: So noted.

Same ruling.

BY MR. HANKINSON:

Q In that respect, would you just outline to the Court basically what you did?

A Yes. I reviewed the entire record on appeal that I was provided, which included a transcript of the trial and the trial hearings that were conducted in the case. I also reviewed a copy of a tape recorded statement that apparently the Defendant gave to Larry Campbell of the Sheriff's Department.

I also reviewed two reports that were rendered by the psychiatrists who were involved in the case. And I also reviewed a transcript of the last hearing in this case, the December 19, 1988, transcript. And I have also had the benefit [101] of having heard the testimony that was given today.

Q And upon entering into this, what was your understanding or agreement with the State?

A Simply that I would review all the material and reach an opinion about whether or not Mike Corin rendered ineffective assistance of counsel and advise you of what that opinion was, whether it was, in my opinion, reasonably effective or not.

Q Based on the investigation you did and the experience that you outlined, did you come to an opinion as to Mr. Corin's effectiveness?

A Yes, I sure did.

Q And what was your opinion?

A In my opinion, Michael Corin rendered effective assistance of counsel to the Defendant in the defense of this case.

Q Okay. If you would, elaborate on that, and how you arrived at that opinion.

A There are actually two factors that are involved in it. The first factor is that I found that there was no, in my opinion, serious deficiency in the manner in which Mr. Corin conducted the defense of this case that was below the standards of competent counsel. That is the first factor.

The second factor is that, even assuming that there was a serious deficiency in Mr. Corin's conduct of the defense of this case that was below that of competent counsel, that it, [102] nevertheless, had no effect whatsoever on the outsome [sic] of the case.

Q Explain what you mean by that.

A What I mean is that, as Mr. Guarisco testified, and which is also my opinion, the evidence in this case is absolutely overwhelming. Mr. Corin could have cross-examined

the witnesses during the guilt phase of this case until he turned blue and it would have done absolutely no good.

This case involves a situation where, as best I can count, this Defendant confessed having committed this crime to at least seven different people that I can count from the transcript. At least four of those people that he confessed to, he gave extensive confessions, detailing facts and circumstances of the crime. And as part of one of those confessions, the tape recorded confession that he gave to Larry Campbell of the Sheriff's Department, that confession, in my view, goes into excruciating detail to the point where there was absolutely no doubt whatsoever that the Defendant Joe Nixon killed Jeanne Bickner.

As a matter of fact, I think Judge Hall probably said it as well as anybody. He commented at one point on the record that "This case was proven not only beyond a reasonable doubt, this case was proven beyond all doubt." And I think that is essentially what we have here.

What Mike Corin did was to recognize that this case [103] was essentially one trial that may have had two phases that are involved in it. And what Mr. Corin did was to select the issue that really had to be tried in this case and try that issue. And, quite frankly, I don't think that there was a better strategy that could have been employed in the defense of this case than the one that Mr. Corin employed.

Q Now, early on in your consideration of this case, as I recall, you made one specific request of me for certain reports. Do you recall that?

A Right. I requested that you provide me with the psychiatrists' reports.

Q And why did you request those specific reports?

A Because it was of some concern to me to determine whether there was some mental type defense that could be interposed in this particular case.

Q In you review of those reports and the trial testimony, did you find anything that Mr. Corin overlooked?

A Not that he overlooked that he could have presented in the guilt-innocence phase of this case. I think that he did an excellent job of presenting that testimony though in the penalty phase of the case. And that is exactly where it needed to be.

MR. HANKINSON: Your Honor, if I could have just a moment.

THE COURT: Yes, sir.

[104] MR. HANKINSON: That's all the questions I have at this time, Your Honor.

MR. STRICKLAND: Thank you, Your Honor.

Joe Elton NIXON, Appellant.

v.

STATE of Florida, Appellee

No. 67583.

Supreme Court of Florida.

Nov. 29, 1990.

Rehearing Denied Jan. 24, 1991.

Defendant was convicted in the Circuit Court, Leon County, J. Lewis Hall, J., of first-degree murder and sentenced to death. On appeal, the Supreme Court, Ehrlich, J., held that: (1) trial was properly allowed to proceed in capital murder defendant's absence; (2) photographs of victim were admissible; and (3) defendant was not entitled to instruction informing jury of maximum sentences for other crimes of which he had been convicted as mitigating factor.

Affirmed.

T. Whitney Strickland, Jr. of Oven, Gwynn & Strickland, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., and Patricia A. Conners, Gary L. Printy and Richard B. Martell, Asst. Attys. Gen., Tallahassee, for appellee.

EHRLICH, Justice.

Joe Elton Nixon appeals his conviction of first-degree murder and sentence of death for the 1984 murder of a

Tallahassee woman. He also appeals his convictions of kidnapping, robbery, and arson and the trial court's departure from the recommended guideline sentence for those convictions. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and affirm the convictions and sentences.

On Monday, August 13, 1984, the charred body of Jeanne Bickner was found tied to a tree in a wooded area in Leon County. The next morning Ms. Bickner's car, the interior and trunk of which had been gutted by fire, was found in a Tallahassee drainage ditch. The same day, after receiving information from Joe Elton Nixon's girlfriend, Wanda Robinson, and brother, John Nixon, that he had admitted the killing, had been driving the victim's car prior to burning it, and had pawned two of her rings, Tallahassee police arrested Nixon. Nixon was charged with first-degree murder, kidnapping, robbery, and arson.

At trial, there was testimony that after church on August 12, 1984, Ms. Bickner went to a local mall to have lunch with friends. She parked her orange M.G. convertible in the mall parking lot. Ms. Bickner was later seen in the parking lot giving a black man jumper cables from the trunk of her car. Witnesses testified that on the afternoon of August 12 they saw the orange M.G. driven by a black male, later identified as Nixon, near the vicinity of the site where the body was found. Ms. Bickner's body was discovered by a couple riding through the woods who reported the incident to the police. The charred body was in a seated position tied around the waist with jumper cables to a pine tree. Wanda Robinson, John Nixon and other witnesses testified that they saw Nixon driving Ms. Bickner's orange M.G. Robinson and John Nixon also testified that Nixon admitted killing a white woman by tying her with jumper cables and burning her. Nixon also showed them two of Ms. Bickner's rings and later said he had pawned the rings. Robinson and John Nixon also testified that on the morning of the fourteenth, Nixon told them that he was going to burn the orange M.G. There was

testimony that Nixon attempted to sell the M.G. prior to burning it. A pawn shop receipt signed by Nixon for two of Ms. Bickner's rings was entered into evidence. A laboratory analyst for the Florida Department of Law Enforcement testified that Nixon's palm print was found on the trunk lid of Ms. Bickner's M.G.

After his arrest, in a taped confession which was played to the jury, Nixon admitted murdering Ms. Bickner. He described how he met Ms. Bickner at the mall and asked her to take him to his uncle's house because he was having car trouble. Once on the road, Nixon hit Bickner in the face. When she stopped the car, Nixon put her in the trunk and then drove to a secluded wooded area where he took her from the trunk and tied her to a tree with jumper cables. According to Nixon, the two talked about their lives. Ms. Bickner offered to give Nixon money, to sign her car over to him, begging him not to kill her. Nixon recounted how he burned Ms. Bickner's personal belongings and then threw the top of the convertible into the fire. At some point after placing a paper bag over her head, Nixon threw the smoldering convertible top on Ms. Bickner, setting her on fire. He then left the scene in the M.G. According to the medical examiner, Ms. Bickner was alive at the time she was set on fire and the fire was the cause of death. The jury convicted Nixon of the offenses charged. In accordance with the jury's recommendation, finding five aggravating factors[1] and no mitigating factors, the trial court imposed the death penalty.

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[1] The trial court found the following aggravating factors:

1) the defendant was previously convicted of another violent felony;
2) the murder was committed while the defendant was engaged in the commission of a kidnapping;
3) the murder was committed for pecuniary gain;
4) the murder was especially heinous, atrocious, or cruel; and
5) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Nixon raises seven claims in connection with the guilt phase of the trial and eight claims in connection with the penalty phase. Of the fifteen claims raised only nine merit discussion.[2]

GUILT PHASE

Nixon's first claim is that he was denied effective assistance of counsel when his trial counsel, without record approval of Nixon, conceded Nixon's guilt and sought leniency. This claim is based on the following comments by counsel made during opening statement and closing argument. In opening statement, defense counsel stated:

> In this case, there will be no question that Jeannie [sic] Bickner died a horrible, horrible death. Surely she did and that will be shown to you. In fact, that horrible tragedy will be proved to your satisfaction beyond any reasonable doubt.
>
> In this case, there won't be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie [sic] Bickner's death. Likewise, that fact will be proved to your satisfaction beyond any reasonable doubt. This case is about the death of Joe Elton Nixon and whether it

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[2] The following claims do not merit discussion: 1) that section 921.141, Florida Statutes (1983), is unconstitutional;2) that the trial court erred by refusing to omit the words "a possible doubt" from the standard jury instruction on reasonable doubt; 3) that the penalty - and guilt-phase instructions impermissibly diminished the jury's sense of responsibility for its sentencing recommendation, in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); 4) that the trial court erred in failing to permit Nixon to make a statement at the sentencing proceeding; 5) that it was error for kidnapping and robbery to be considered in determining guilt and also used as an aggravating factor; and 6) that the trial court erred in barring prospective members of the jury from service without adequate inquiry under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement.

During closing argument defense counsel made the following comments:

> Ladies and gentlemen of the jury, I wish I could stand before you and argue that what happened wasn't caused by Mr. Nixon, but we all know better. For several very obvious and apparent reasons, you have been and will continue to be involved in a very uniquely tragic case. In just a little while Judge Hall will give you some verdict forms that have been prepared. He'll give you some instructions on how to deliberate this case. After you've gotten those forms and you've elected your foreperson and you've done what you must do, you will sign those forms. I know you are not going to take this duty lightly, and I know what you will decide will be unanimous. I think that what you will decide is that the State of Florida, Mr. Hankinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson.

Nixon takes the position that counsel's statements were the functional equivalent of a guilty plea, requiring a record inquiry as to whether he knowingly and voluntarily consented to this strategy. Nixon argues that this concession of guilt resulted in a 'complete breakdown in the adversarial process which resulted in a complete denial of his right to counsel' and therefore constitutes ineffective assistance per se under the

United States Supreme court's decision in United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). See e.g., Wiley v. Sowders, 647 F.2d 642 (6th Cir.) (petitioner was deprived of effective assistance of counsel when defense counsel admitted petitioner's guilt, without first obtaining petitioner's consent to the strategy), cert. denied, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 630 (1981); People v. Hattery, 109 Ill.2d 449, 94 Ill.Dec. 514, 488 N.E.2d 513 (1985) (defense counsel is per se ineffective where counsel concedes defendant's guilt, unless the record shows that the defendant knowingly and intelligently consented to this strategy), cert. denied, 478 U.S. 1013, 106 S.Ct. 3314, 92 L.Ed.2d 727 (1986); State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (1985) (it is per se ineffective assistance of trial counsel where counsel admits defendant's guilt without the defendant's consent), cert. denied, 476 U.S. 1123, 106 S.Ct. 1992, 90 L.Ed.2d 672 (1986).

Over Nixon's objection, this Court remanded to the trial court for an evidentiary hearing to determine whether Nixon was informed of the strategy to concede guilt and seek leniency. Order of October 27, 1987. After a second order of this Court, dated October 4, 1988, clarifying the procedure to be followed in connection with the evidentiary hearing, the defendant was allowed to present witnesses but the state was not. The state's cross-examination of Mr. Corin, Nixon's trial counsel, was limited to the scope of direct examination by the defense. Because the trial court did not interpret the order of October 4, 1988, as requiring him to make findings or conclusions, none were made. On further remand by order of February 1, 1989, the state was allowed to present witnesses. However, the state's examination of Mr. Corin was extremely limited due to his refusal to testify concerning matters not already addressed during his testimony for the defense absent Nixon's waiver of the attorney-client privilege. Nixon refused to waive the privilege and the state was unable to fully examine Mr. Corin.

We recognize the confusion resulting from our remand for these atypical proceedings and decline to dispose of this claim on the present state of the record which we view as less than complete.[3] Accordingly, we do so without prejudice to raise the issue in a later motion to vacate pursuant to Florida Rule of Criminal Procedure 3.850.

As his second claim, Nixon contends that the prosecutor made an impermissible "Golden Rule" argument when he told the jury 'we have an obligation to make you feel just a little bit . . . of what Jeanne Bicker [sic] felt.' In closing argument during the guilt phase of the trial, the prosecutor stated:

> I noticed sometimes people wonder about and I guess have different ideas on what makes a prosecutor tick. You probably wonder: Well, do Mr. Guarisco and I enjoy the fact that we're presenting this horrid thing to you. I assure you we don't.

---

[3] The trial court found the following pursuant to our order of February 1, 1989:

1. Trial Defense Counsel Corin reviewed with Defendant/Appellant Nixon the defense approach to the case in general terms including, but not limited to, the probability that he would concede the killing of the victim by Nixon.

2. Corin and Nixon had previous attorney-client relationships, both were veterans of the criminal justice system and although Nixon manifested no reaction, he understood what was to take place.

3. Nixon made no objection and did not protest the strategy and tactic employed at trial.

Based on the foregoing, this Court concludes that the Defendant/Appellant Nixon has not sustained his burden of proof by the applicable standard that he (a) was neither informed nor knew of the trial strategy and tactic employed by Defense Trial Counsel Corin nor (b) did not consent thereto or (c) acquiesce therein.

> Yet, at the same time, we have an obligation to make you feel just a little bit, just a little bit, of what Jeanne Bicker [sic] felt because, otherwise, sometimes I think it's easy to forget that. And the emotions involved in this case - and they are there. There are emotions going both ways in this case.
>
> Hopefully, those emotions on the one hand where you are talking about imposing, well, the most serious penalties we have against a person which is an emotional thing are counterbalanced by the emotions of the terrible thing that's happened in this case. And then as a group of 12 people you can set this aside, set that aside and you make an objective decision. You follow the law that the Judge gives you because that's what we need you to do.

At the close of the state's argument, defense counsel moved for a mistrial, noting "at this time to instruct the jury to disregard it would be to no avail." After having the comment read back to the court reporter, the trial court denied the motion stating, "I don't think that's a Golden Rule argument. I think it's close, but I don't think that's a pure Golden Rule argument."

Initially, we note that defense counsel failed to make a contemporaneous objection to the above remarks which were made at the commencement of the state's argument. Ordinarily, to preserve a claim based on improper comment, counsel has the obligation to object and request a mistrial. If counsel fails to object or if, after having objected, fails to move for a mistrial, his silence will be considered an implied waiver. Clark v. State, 363 So.2d 331, 335 (Fla. 1978), abrogated on other grounds, State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). In connection with closing argument, a motion for mistrial need not be made in the next breath following the objection to the offensive remark. This

rule avoids interruption in the continuity of the argument and affords defendants an opportunity to evaluate the prejudicial nature of the objectionable remarks in the context of the total argument. State v. Cumbie, 380 So.2d 1031, 1033 (Fla. 1980).

Nixon argues that under Cumbie, his motion for mistrial at the close of argument, absent a contemporaneous objection, was sufficient to preserve this issue for appeal. We do not construe Cumbie to obviate the need for a contemporaneous objection. The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of the judicial system. A contemporaneous objection places the trial judge on notice that an error may have been committed and thus, provides the opportunity to correct the error at an early stage of the proceedings. Castor v. State, 365 So.2d 701, 703 (Fla. 1978). While the motion for mistrial may be made as late as the end of the closing argument, a timely objection must be made in order to allow curative instructions or admonishment to counsel. As noted by defense counsel in this case, in many instances a curative instruction at the end of closing argument would be of no avail. Accordingly, defense counsel's motion for mistrial at the end of closing argument, absent a contemporaneous objection, was insufficient to preserve this claim under our decision in Cumbie. Even if the issue were properly preserved, we agree with the trial court that taken in context the comments complained of did not amount to a Golden Rule argument.

Nixon's third claim is that his absence during critical proceedings at various times throughout the trial requires reversal of his conviction and sentence. On July 8 and 9, 1985, Nixon refused to be present during a hearing on various pretrial motions. In both instances counsel waived Nixon's presence for the limited purpose of hearing the motions. Although Nixon was present at the commencement of jury selection on July 15, 1985, as voir dire continued on the morning of July 16, 1985, Nixon refused to enter the courtroom. Defense counsel explained to the

judge that Nixon had disrobed to his underwear, and was demanding a black judge and a black attorney, and did not wish to return to the courtroom. After a recess, Nixon still refused to attend the trial. The trial judge then inquired of the bailiff as to why Nixon had not returned. The judge was informed that Nixon had told another officer that he was not going to court 'for them to railroad me.' Defense counsel informed the judge that Florida Rule of Criminal Procedure 3.180(b) allowed a defendant to voluntarily absent himself from the courtroom if the court chose to try Nixon in absentia. The trial court conducted a hearing in the holding cell to determine if it would be in Nixon's best interest to allow him to absent himself from the proceedings. During the hearing, Nixon was clad only in his underwear. He reiterated to the judge that he did not wish to return to the courtroom, that he wanted another attorney and wanted to return to the jail-house. Nixon threatened that if forced to return to the courtroom, "I still [sic] run my mouth and speak when I get ready unless you tape it up." Nixon repeatedly stated that he wanted to return to the jail-house and did not care if the trial proceeded without him. After questioning the officer who had transported Nixon from the jail to the holding cell concerning the events leading up to appellant's removal of his clothes and desire to return to the jail-house, the trial court indicated that if Nixon did not return to the courtroom that afternoon, the court would consider his decision "to be a knowledgeable, voluntary and intelligent waiver of his right to be present during the course of the trial." When Nixon refused to return to the courtroom that afternoon, the court found that Nixon had knowingly, intelligently, and voluntarily waived his attendance and that the proceedings would continue without him.

> I have considered options including but not limited to, I think, the most severe step which is to compel the attendance of the Defendant by physically forcing his attendance in the courtroom, if necessary to manacle, bind and gag and the like.

> It's my view that Mr. Nixon does not want to come to the courtroom. And to bring him into the courtroom under those circumstances would be manifestly prejudicial to this case. Therefore, I'm going to accede to his desire not to participate.
>
> It's my view that we have done about as much as can possibly be expected to seek to accommodate attendance for him. To induce him to attend. We've even recessed Court for a period of time so that he might reflect upon that decision. That has been to no avail.

During voir dire, defense counsel asked prospective jurors if Nixon's absence would affect their impartiality and all replied that it would not. Thereafter, Nixon refused to attend most of his trial.

In Peede v. State, 474 So.2d 808, 814 (Fla. 1985), cert. denied, 477 U.S. 909, 106 S.Ct. 3286, 91 L.Ed.2d 575 (1986), we held that "a defendant can waive his right to be present at stages of his capital trial if he personally chooses to voluntarily absent himself." It is clear from the record that Nixon did not wish to attend the proceedings, threatening to disrupt them if so forced. A defendant will not be forced to attend his capital trial if his actions or the means used to ensure his presence would prejudice him in the eyes of the jury. As in Peede, the trial judge in this case took every precaution to ensure that Nixon's absence was voluntary. A hearing was held in Nixon's holding cell. A recess was initially taken to allow Nixon time to reflect on his decision. Counsel was allowed to question the prospective jurors to ensure Nixon's absence would not prejudice him. At various intervals throughout the proceedings the trial judge questioned a custodial officer to ascertain whether Nixon had evidenced a change of mind, which he had not. Under these circumstances, it was not error to p[illegible]oceed with the trial in Nixon's absence.

During the guilt phase of the trial seven photographs of the victim were entered into evidence over defense counsel's objection. Nixon contends that the admission of an "unnecessarily large number of inflammatory photographs" of the victim in a charred state resulted in a fundamentally unfair proceeding. He maintains that "there was no justifiable relevancy for the admissibility of the photographs since the cause of death and nature of death had been clearly established and there was no circumstance which necessitated the introduction of photographs of the victim." The test of admissibility of photographs such as these is relevancy rather than necessity. Gore v. State, 475 So.2d 1205, 1208 (Fla. 1985), cert. denied, 475 U.S. 1031, 106 S.Ct. 1240, 89 L.Ed.2d 348 (1986). Four of the photographs, exhibits 10G, 10H, 10K, and 10J, showing various positions of the victim's charred body tied to a tree at the crime scene were introduced by the state during the testimony of Deputy Gunter. The photographs were introduced to aid the detective in explaining the condition of the crime scene when the police arrived. See id. (allegedly gruesome photographs of victim relevant to show condition of the body when first discovered by the police and to show considerable pain inflected on victim). The other three photographs, exhibits 12, 13A, and 13B, which were taken at the coroner's office and which show the victim's head and upper body were introduced during the pathologist's testimony. These photographs assisted the pathologist in explaining the nature of the victim's injuries and the cause of her death. See Bush v. State, 461 So.2d 936, 939 (Fla. 1984) (photographs are admissible where they assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted), cert. denied, 475 U.S. 1031, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986).

We do not agree that the seven photographs admitted, none of which were cumulative, constituted an unnecessarily large number of inflammatory photographs. Cf. Young v. State, 234 So.2d 341 (1970) (error to admit forty-five gruesome photographs of the victim), receded from on other grounds, State

v. Retherford, 270 So.2d 363 (Fla. 1972). Nixon is correct that the challenged photographs are extremely gruesome; they accurately depict the fact, as noted in the trial court's sentencing order, that "Jeanne Bickner was the victim of a vicious, barbaric and savage murder." However, because the photographs are not so shocking in nature as to outweigh their relevancy, the trial court did not abuse its discretion in admitting them. Bush, 461 So.2d at 940.

We also find no merit to Nixon's next claim that the trial court erred in failing to establish the competency of a juror who was excused from service during the penalty phase of the trial due to emotional problems. The jury returned its verdict of guilty on Monday, July 22, 1985. On Wednesday, July 24, during the penalty phase of the trial, the trial judge was informed by the bailiff that he was concerned about Juror number 12, who was exhibiting "strange" behavior. With counsels' concurrence the trial judge decided that Juror number 12 should be monitored. At this point, defense counsel expressed concern that if Juror number 12, who was black, was removed from the jury it might upset the "representative mix" which had been achieved. Defense counsel also expressed concern that if the juror's problem was not a new one, it could have affected the jury's guilt determination. The next day, the bailiff informed the court that it had been difficult to get Juror number 12 ready to come to court because she locked herself in the bathroom. The bailiff also informed the court that he had learned that "a few years ago" Juror number 12 had a nervous breakdown and that she was "in the process of taking Lithium." According to the bailiff, the bizarre behavior was first manifested on Tuesday afternoon, July 23, the day after the conclusion of the guilt phase of the trial. The trial court determined that Juror number 12 should be replaced by an alternate. The court concluded that "the condition of Juror No. 12 did not manifest itself until the conclusion of the guilty/not guilty phase. I see no reason to disturb that facet of the case."

We agree with the state that the issue was not properly preserved for review. Although defense counsel evidenced concern that Juror number 12's problems may have affected the guilt phase of the trial, counsel never sought further judicial inquiry. Counsel did not object to the trial court's conclusion that Juror number 12's condition did not manifest itself until after the guilt phase of the trial was completed nor did he move for a mistrial. In fact, defense counsel acknowledged that "the onset of [Juror number 12's] symptoms was apparently post-guilt phase" and that "there is no clear indication" that Juror number 12 had mental problems that could have affected the jury's guilt-phase deliberations. Counsel also declined to voir dire Juror number 12 before the matter was concluded. Further, even if the issue had been preserved, there was insufficient evidence that Juror number 12 likely suffered from incompetence during the guilt phase to warrant further inquiry. See United States v. Mauldin, 714 F.2d 854 (8th Cir. 1983) (absent substantial if not wholly conclusive evidence of incompetency, such as proof of an adjudication of insanity or mental incompetence made shortly before or after the trial, courts will not set aside a verdict or make further inquiry into a juror's competency during trial); United States v. Dioguardi, 492 F.2d 70 (2d Cir.) (same), cert. denied, 419 U.S. 873, 95 S.Ct. 134, 42 L.Ed.2d 112 (1974).

PENALTY PHASE

Nixon's first claim in connection with the penalty phase of the trial concerns a statement made by Nixon after his arrest to Detective Livings concerning the removal of Ms. Bickner's underwear. During the penalty phase of the trial, Detective Livings testified that between 8:00 and 9:20 p.m. on the day of Nixon's arrest he asked Nixon about the victim's underwear. According to the detective, Nixon told him he had removed them because he wanted to scare her. Nixon maintains that the

statement was inadmissible because it was given without full benefit of Miranda[4] warnings. We cannot agree.

There is no requirement that an accused be continually reminded of his rights once he has intelligently waived them. Bush v. State, 461 So.2d at 939. Nixon had been given full Miranda warnings on at least four separate occasions prior to his taped confession, twice at the time of his arrest, once in route to the police station, and once at 12:20 p.m. prior to giving the taped confession. Each time he stated that he understood his rights and prior to giving the taped confession he executed a written waiver which has not been challenged. Approximately eight hours after giving the taped confession, Detective Livings told Nixon that he had a question to ask him. The detective advised Nixon "that [Nixon] didn't have to talk with [him]; that [Nixon] did not have to give [him] any information; that [Nixon] still had the right to remain silent." After being reminded of his rights, Nixon indicated his willingness to speak with Detective Livings by stating "I got no problems talking with you." Although the detective did not give Nixon a full Miranda warning, the trial court correctly ruled that Nixon understood his rights and knowingly and intelligently waived them prior to the challenged statement and that his statement that he had no problem discussing the case was a valid waiver.

We also reject Nixon's claim the trial court erred in failing to instruct the jury on mitigating factors under sections 921.141(6)(b) (defendant was under the influence of extreme mental or emotional disturbance), 921.141(6)(f) (capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired), and 921.141(6)(g) (age of defendant at the time of the crime), Florida Statutes (1985). Nixon argues that although defense counsel requested that no instructions be given on

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[4] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

statutory mitigating factors, the trial court had a duty to so instruct because there was evidence of each of these factors. Defense counsel specifically requested that only the following instruction be given:

> The mitigating circumstances which you may consider are unlimited, and you may consider any evidence presented at trial and during the sentencing proceedings in mitigation of the defendant's sentence.

Since defense counsel requested that the instructions to which Nixon claims he was entitled not be given, he cannot now take the position that it was error to fail to give them. Further, while it may have been preferable to have instructed on the statutory mitigating factors urged, the catchall instruction given served as an adequate vehicle to allow the jury to consider all the mitigating evidence presented.

In connection with the above claim, Nixon also maintains that the trial court impermissibly refused to consider the mitigating evidence presented. While the trial court found that there was no evidence to support these mitigating factors, it is clear from the record that the court considered and rejected all the evidence presented.

Nixon next claims that the trial court erred in refusing to give a requested instruction informing the jury of the maximum sentences for kidnapping, robbery, and arson. During the penalty phase of the trial, defense counsel requested such an instruction, stating that he wanted "to be able to argue those potential punishments to the jury as part of the theory of defense." The trial court denied the request, noting that the jury obviously knew that it had convicted Nixon of the three other felonies. The court expressly noted that defense counsel was entitled to argue in mitigation that Nixon stood convicted of the other serious

felonies. Defense counsel reiterated his objection to the court's refusal to give the requested instruction.

Nixon maintains that the fact that he was convicted of three other offenses which carried lengthy maximum penalties was a circumstance on which the jury should have been instructed under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Florida Rule of Criminal Procedure 3.390(a) provides that "[e]xcept in capital cases, the judge shall not instruct the jury on the sentence which may be imposed for the offense for which the accused is on trial." This rule has been construed to mean that the jury need only be instructed as to the possible penalty when it is faced with the choice of recommending either the death penalty or life imprisonment. As to offenses in which the jury plays no role in sentencing, the jury will not be advised of the possible penalties. Coleman v. State, 484 So.2d 624, 628 (Fla. 1st DCA 1986).

As we recently noted in King v. Dugger, 555 So.2d 355, 359 (Fla. 1990), "Lockett requires that a sentencer 'not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" The fact that Nixon was convicted of three other offenses each of which carried lengthy maximum penalties is irrelevant to his character, prior record, or the circumstances of the crime. Therefore, the trial court did not err in refusing to give the instruction. Even if it had been appropriate for the jury to be instructed on the maximum penalties for the other crimes, the requested instruction merely set forth the maximum sentences for each of the noncapital offenses. The instruction did not inform the jury that it could consider the maximum sentences for the noncapital offenses as a mitigating factor. The jury was aware of the noncapital offenses for which Nixon was convicted, counsel urged those convictions as mitigation, and the jury was instructed that the factors which it would consider in mitigation were unlimited.

GUIDELINES DEPARTURE

In connection with the kidnapping, robbery, and arson convictions, the trial court departed from the recommended guideline range of twelve-to-seventeen years, sentencing Nixon to consecutive terms of life imprisonment for kidnapping, fifteen years for robbery, and fifteen years for arson. The court based departure on the following: 1) the "[e]motional trauma suffered by the victim and her fear and emotional distress;" 2) Nixon's "escalating pattern of criminal conduct culminating in the instant offense;" 3) Nixon's status as an habitual offender; and 4) "[a]ny other reasons articulated by this Court at the sentencing hearing."

We agree that reasons 3 and 4 are not clear and convincing reasons for departure. Winters v. State, 522 So.2d 816 (Fla. 1988); Whitehead v. State, 498 So.2d 863 (Fla. 1986); State v. Jackson, 478 So.2d 1054 (Fla. 1985), abrogated on other grounds, Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987), receded from on other grounds, Wilkerson v. State, 513 So.2d 664 (Fla. 1987). However, we have held reasons 1 (emotional trauma) and 2 (escalating criminal conduct) to be clear and convincing under appropriate circumstances. In Tillman v. State, 525 So.2d 862, 864 (Fla. 1988), we explained that

> emotional trauma of the victim, may serve as a clear and convincing reason for departure where there is evidenced "a discernible physical manifestation resulting from the psychological trauma," State v. Rousseau, 509 So.2d 281, 284-85 (Fla. 1987), or where there is evidence that the trauma is the result of "extraordinary circumstances which are clearly not inherent in the offense charged." Casteel v. State, 498 So.2d 1249, 1253 (Fla. 1986).

While there was no evidence of a physical manifestation of psychological trauma because the victim in this case died at the scene, there is credible evidence that after being abducted, Ms. Bickner was tied to a tree and terrorized before being burnt alive. These are extraordinary circumstances causing emotional trauma which are clearly not inherent in the crimes of kidnapping or robbery. Cf. Ochoa v. State, 509 1115 (Fla. 1987) (emotional trauma not clear and convincing reason for departure where there were no "extraordinary circumstances" clearly not inherent in the crime of kidnapping causing the trauma).

Reason 2 (escalating pattern of criminal conduct) is a valid reason for departure, Keys v. State, 500 So.2d 134 (Fla. 1986), which is supported in this case by evidence of Nixon's prior criminal history. As a juvenile, Nixon was adjudicated delinquent six times in connection with various charges of shoplifting, petit larceny, grand larceny, possession or sale of stolen property, first-degree arson, possession of burglary tools, and burglary. As an adult, Nixon was convicted of armed robbery in 1980, burglary of a structure in 1981, attempted burglary of a dwelling in 1984 and the offenses for which he now stands convicted: arson, robbery, kidnapping, and murder.

While reason 4 (any other reasons articulated at sentencing) is not a clear and convincing reason for departure under our decision in Jackson, 478 So.2d at 1055-56, there did not appear to have been other reasons articulated at the sentencing hearing upon which the departure could have been based. Because we find beyond a reasonable doubt that the trial court would have departed in the absence of the invalid reasons, we need not remand for resentencing. Albritton v. State, 476 So.2d 158 (Fla. 1985).[5]

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[5] While our decision is not based on this factor, we note that Nixon's conviction of first-degree murder, a capital felony which cannot be scored as an additional offense at conviction, could have served as a valid reason for departure. Torres-Arboledo v. State, 524 So.2d 403, 414 (Fla.), cert. denied, 488 U.S. 901, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988); Hansbrough v. State,

Accordingly, Nixon's convictions and sentences are affirmed.

SHAW, C.J., and OVERTON,

McDONALD, BARKETT, GRIMES and KOGAN, JJ., concur.

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509 So.2d 1081, 1087 (Fla. 1987).

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

STATE OF FLORIDA,

vs. CASE NO. 84-2324

JOE ELTON NIXON,

Defendant.
_____/

ORDER DENYING MOTION
FOR POSTCONVICTION RELIEF

This cause came before the Court on the Defendant's Motion for Post Conviction Relief filed pursuant to Rule 3.850, Florida Rules of Criminal Procedure. The Court having considered the matter, having reviewed the court file and being otherwise fully advised finds that the motion should be denied without a hearing.

1.) The following issues are denied as legally insufficient or procedurally barred as they were either raised and rejected or could have been raised on direct appeal:

a.) Defendant was denied due process of law and the constitutional right to a fair trial under the Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution because (A) the State tried him without first determining his competency to stand trial, and (B) the State tried him while he was incompetent.

The issue of a defendant's competency to stand trial is not cognizable in a motion for post conviction relief because it is

an issue which should or could have been raised on direct appeal. See, **Lopez v. Singletary**, 634 So.2d 1054 (Fla. 1993); **Johnson v. State**, 593 So.2d 206 (Fla. 1992); **Medina v. State**, 573 So.2d 293 (Fla. 1990); **Rosier v. State**, 655 So.2d 160 (Fla. 1st DCA 1995).

b.) The State violated Fla.R.Crim.P. 3.210 - 3.215 when it tried Mr. Nixon without first following the procedures and conducting the psychiatric examination required by those rules.

This is also an issue which could or should have been raised on appeal. See, **Lopez**, **supra**; **Johnson**, **supra**.

c.) Defendant who suffers from organic brain damage and other psychiatric disorders, was denied a competent mental health examination and counsel was ineffective for failing to investigate for information necessary for such an examination, in violation of his rights under Article I, ss. 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The issue of whether the court appointed evaluations were insufficient is an issue which could or should have been raised on direct appeal and is therefore procedurally barred. See, **Lopez**, **supra**; **Johnson**, **supra**. The issue of whether counsel's omission to provide the experts with the required information constituted ineffective assistance of counsel will be addressed under the ineffective assistance of counsel claims.

d.) Defendant's jury weighed invalid and unconstitutionally vague aggravating circumstances, in violation of his right to an individualized and reliable sentencing proceeding, as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, ss. 9, 16, and 17 of the Florida Constitution.

Defendant refers the Court to **Espinosa v. Florida**, 112 S.Ct. 2920 (Fla. 1992) and **Sochor v. Florida**, 112 S.Ct. 2114 (1992). Both cases held that in a state where the sentencer weighs aggravating and mitigating circumstances in determining whether to impose the death sentence, the weighing of an invalid aggravating circumstance violates the eighth amendment. Defendant argues that two of the five aggravating circumstances about which the trial court instructed the jury were unconstitutionally vague. Although the supreme court upheld the trial court's findings of the aggravating factors, Defendant contends that the Florida Supreme Court did not conduct any review of the effect of the error in the instructions to Defendant's jury on the "heinous, atrocious, or cruel," or "cold, calculated and premeditated," aggravating factors.

Defendant argues that this issue may be raised in a 3.850 motion because it is a fundamental change in Florida Law. Defendants cites **James v. State**, 615 So.2d 668 (Fla. 1993), wherein the supreme court granted relief based on an **Espinosa** claim in a 3.850 proceeding. That court in **James** held that claims arguing that the instruction on the heinous, atrocious, or cruel aggravator is unconstitutionally vague are procedurally barred unless a "specific" objection on that ground is made at trial and pursued on appeal. Because in **James** the defendant had objected to the standard instruction and had argued the constitutionality of the instruction, the court opined that it would be unfair to deprive him of the **Espinosa** ruling.

Defendant states that counsel moved at the penalty phase charge conference that the especially heinous and cold calculating aggravating circumstances overlap, thereby providing insufficient guidance to the jury. It appears that Defendant is attempting to argue that this issue was properly preserved. Pursuant to **James**, the objection must be specific and raised on appeal. The record indicates that no specific objection was made nor was the issue raised on appeal. Accordingly, **James** is distinguishable from the instant case and the issue is

procedurally barred. See also, **Harvey v. Dugger**, 656 So.2d 1253 (Fla. 1995).

e.) The prosecutor's improper argument during voir dire and opening and closing arguments at the guilt and penalty phases rendered Defendant's conviction and death sentence unreliable in violation of his rights under Article I, ss. 9 and 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

This is also an issue which could or should have been raised on Defendant's direct appeal and is procedurally barred. See, **Roberts v. State**, 568 So.2d 1255 (Fla. 1990). Defendant did raise one issue of prosecutorial misconduct alleging a Golden Rule Violation which was raised and rejected on appeal. (Exhibit A-pg. 6). As such, this Court does not have jurisdiction to entertain this claim.

f.) Newly discovered evidence establishes that the victim may not have been abducted from the mall by force, that Wanda Robinson and John Nixon, Jr., gave separate statements to the sheriff's office that were never reported or disclosed to the defense, that John Nixon may either have had more involvement in the crime than known at trial or actually committed the crime, that John Nixon was a paid informant, and that the State obtained a statement allegedly made by Defendant to Detective Livings in violation of his right to counsel.

The portion of the issue concerning new evidence and **Brady** claim will be addressed later in this order. As to the statement made by Defendant to Detective Livings, this issue was already addressed by the supreme court. (Exhibit A-pg. 9). As such, this Court lacks jurisdiction to entertain this claim.

g.) Conducting penalty phase proceeding in Defendant's absence, when he relied on mental health mitigation to support a life sentence, violated his right to present a defense,

as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

Claims involving a defendant's absence from proceedings are also matters which should have been raised on direct appeal. See, **Rivera v. Dugger**, 629 So.2d 105 (Fla. 1993). Further, Defendant did raise the issue of his absence during the "guilty" phase of the trial wherein the supreme court held that it was not error to proceed with the trial in Defendant's absence. The supreme court stated that a defendant will not be forced to attend his trial if his actions or the means used to ensure his presence would prejudice him in the eyes of the jury. (Exhibit A, pgs. 6-7). It is not appropriate to use a different argument to relitigate the same issue. Accordingly, Defendant may not raise a related claim on collateral attack. See, **Turner v. Dugger**, 614 So.2d 1075 (Fla. 1992); **Medina v. State**, 573 So.2d 293 (Fla. 1990).

h.) The jury instructions at the penalty phase were unreasonably vague and confusing; as a result, the instructions created a presumption in favor of death, and the jurors' discretion was not suitably guided, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, ss. 9 and 17 of the Florida Constitution.

Once again, the propriety of jury instructions is an issue which should or could have been raised on appeal. See, **Reed v. State**, 640 So.2d 1094 (Fla. 1994). As pointed out in the State's Response, the Florida Supreme Court has consistently held that the more "traditional" argument, to the effect that the penalty phase jury instructions "shift" the burden of proof on to the defense, is not cognizable on a 3.850. See, **Card v. State**, 652 So.2d 344 (Fla. 1995); **Turner**, **supra**.

I.) Race discrimination permeates the justice system in Leon County and affected the preparation and prosecution of

this case at every stage; as a result, Defendant's conviction and death sentence violate his right to equal protection of the laws and to be free from cruel and unusual punishments, as guaranteed by Article I, ss. 2, 9, 16, 17, and 21 of the United States Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

This issue was raised and rejected by the Florida Supreme Court in **Foster v. State**, 614 So.2d 455 (Fla. 1992). Pursuant to **Foster**, Defendant is required to show that the State acted with purposeful discrimination in seeking the death penalty. The instant motion fails to do so. Accordingly, the claim is legally insufficient.

Defendant also alleges that the prosecution exercised peremptory challenges on the basis of race. This issue should have been raised on direct appeal and is therefore procedurally barred. See, **Lightbourne v. State**, 471 So.2d 27 (Fla. 1985).

j.) Defendant's sentence of death was based upon unconstitutionally obtained prior convictions and therefore violates his rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, ss. 9 and 17 of the Florida Constitution.

Defendant argues that two prior convictions which were used as an aggravating circumstance under **Johnson v. Mississippi**, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). Defendant contends that he was incompetent at the time the previous offenses were committed and as such, the convictions violate Defendant's fundamental due process.

Defendant does not allege that any of the previous convictions were overturned. Accordingly, the claim is legally insufficient. See, **Henderson v. Singletary**, 617 So.2d 313 (Fla. 1993).

k.) Defendant was denied his right to a trial before a jury of twelve impartial and mentally competent jurors, when a juror became mentally incompetent and other jurors were exposed to improper and prejudicial information during the course of the trial, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

This issue was raised on appeal but found to be procedurally barred because no objection had been made. The court further opined that even if the issue had been preserved there was insufficient evidence that the juror likely suffered from incompetence during the guilt phase to warrant further inquiry. Thus, the supreme court found no error in the trial court's failure to conduct further inquiry into the matter. (Exhibit A-pg. 8). Defendant's post conviction motion is an improper attempt to relitigate this issue. See, **Turner**, **supra**.

l.) The trial court violated Defendant's rights under the Fifth, Sixth, and Fourteenth Amendments by failing to instruct the jury not to consider the fact that Defendant did not testify, in the absence of a valid waiver by Defendant of his right to that instruction.

This is also an issue which should have been raised on appeal. See, **McCrae v. State**, 437 So.2d 1388 (Fla. 1983); **State v. Johnson**, 651 So.2d 145 (Fla. 2d DCA 1995). In the alternative, if Defendant is alleging that counsel was ineffective in waiving the no-inference instruction that issue will be addressed under the ineffective assistance of counsel claims.

m.) The cumulative impact of judicial error deprived Defendant of his right to a fair trial in violation of the fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, ss. 9, 16, and 17 of the Florida Constitution.

Once again, this issue could or should have been raised on appeal and is procedurally barred.

2.) Defendant raises various claims of ineffective assistance of counsel. The Court will first address the ineffective assistance of counsel claims pursuant to the standard enunciated in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To succeed on a claim of ineffective assistance of counsel under **Strickland**, Defendant must show that but for counsel's unprofessional errors, the result of the proceedings would have been different. To be entitled to an evidentiary hearing to make such showing, the Defendant must allege specific facts which are not conclusively rebutted by the record which demonstrate a deficiency in performance that prejudices the defendant. Defendant fails to sustain this burden. The alleged deficiency in performance by Nixon's trial counsel did not prejudice Nixon, and his allegations of deficient performance do not show such required prejudice.

Defendant alleges that counsel was ineffective in failing to recognize that his relationship with Defendant had deteriorated to the point where he could not effectively represent him; counsel was ineffective in failing to investigate Defendant's competency; counsel was ineffective at the guilty-innocence phase of Defendant's trial; and counsel was ineffective at the penalty phase of Defendant's trial.

The court record demonstrates that the State presented overwhelming evidence against Defendant at trial. The State introduced Defendant's confession to the police wherein he provided specific details regarding the murder which were corroborated by the evidence introduced at trial. (Exhibit B. pg. 608). In his confession, Defendant stated that he met the victim at the Governor's Square Mall and asked her for a ride. He further stated that he hit the victim in the face, put her in the trunk of the car, tied her to two trees with her jumper cables, and threw burning melting material onto her head and face.

Defendant also stated that he left the victim burning, took her car, later burned the car, threw the gas cap into a ditch and threw the car keys into a garbage can. (Exhibit C).

Witness Jeff Atteberry testified that he saw the victim speaking with Defendant at the Governor's Square Mall parking lot and hand him jumper cables. (Exhibit B, pgs. 1858-1866). Dr. Ben Turner, an expert witness in pathology, testified that the victim died by fire. (Exhibit B, pg. 1952). The victim's car was found burned and the gas cap was located where Defendant had specified. (Exhibit B, pgs. 2015-2016). Witness Carroll Hurdle retrieved the victim's car keys from a garbage can where Defendant had said that he had thrown them. (Exhibit B, pgs. 2017-2024).

The State also presented evidence that Defendant admitted killing the victim to John Nixon (Exhibit B, pgs. 2054-2063); Wanda Robinson (Exhibit B, pgs. 2064-2070), James Nixon (Exhibit B, pgs. 1966-1971), Thomas Ingles (Exhibit B, pgs. 1972-1975); and Evelyn Harris (Exhibit B, pgs. 1980-1985). These same witnesses saw the Defendant driving the victim's car on the day of the murder, the day after her murder and two days after her murder. Greg and Susan Cleary testified that they saw Defendant driving the victim's car near the murder scene about the time the murder was committed. (Exhibit B, pgs. 1876-1884, 2089). Additional witnesses testified that they had seen Defendant driving the victim's car. (Exhibit B, pgs. 561-563, 2075-2079).

Expert witness Karen Cooper and Douglas Barrow identified the Defendant's hand prints on the victim's car. (Exhibit B, pgs. 2030-2036, 2039-2051). James Turvaville testified that Defendant attempted to sell the victim's car to him. (Exhibit B, pgs. 561-563). The Defendant pawned the victim's jewelry. The pawn shop owner, Dennis Counsil [sic], identified the Defendant as being the person who pawned the jewelry. (Exhibit B, pages 2070-2073).

On August 30, 1989, the trial court conducted a post conviction evidentiary hearing wherein the State provided additional evidence that it would have presented at trial but elected not to do so since Defendant had admitted guilt. Specifically, the State choose [sic] not call other [sic] another law enforcement officer whom Defendant had confessed to, another witness named Virginia Meeks who would have testified that she saw Defendant in the victim's car and that Defendant showed her rings belonging to the victim, another witness named Judith Hill who would have also testified that she had seen Defendant in the victim's car. (Exhibit D, pgs. 77-82). At this hearing, expert Larry Simpson also testified that if any deficiency had occurred it had no effect whatsoever on the outcome of this case and that the State's case was proven beyond all doubt. (Exhibit D, pgs. 93-96).

The court record reveals that the trial court itself concluded that the trial tactic employed by trial counsel was an excellent analysis of the reality of the case and the preservation of the credibility of any mitigating circumstances that could have been placed before the jury and before the court as to disposition. It was the trial court's opinion that in view of the evidence presented in the case, the jury found the Defendant guilty by the establishment of evidence beyond and to the exclusion of any reasonable doubt. The evidence, preparation of the case and presentation, would have persuaded any jury not only beyond a reasonable doubt, but beyond all doubt. (Exhibit B, pgs. 1048-1049). From an examination of the record, it is the opinion and judgment of this Court that the trial court's conclusions were sound and well-founded.

As to the allegations regarding the penalty stage, the Defendant must show that but for counsel's errors he would probably have received a life sentence. See, **Hildwin v. Dugger**, 654 So.2d 107 (Fla. 1995); **Bertolotti v. State**, 534 So.2d 386 (Fla. 1988). The court record indicates that counsel argued for jury instruction favorable to his client. (Exhibit B, pgs. 726-

732). Defense counsel also introduced fifty exhibits in support of mitigation, (Exhibit B, pgs. 733-734), and called nine witnesses to provide mitigation testimony regarding the Defendant's background and mental and emotional problems. (Exhibit B, pgs. 764-838). Throughout the penalty phase defense counsel continually emphasized his strategic theme, which focused on Defendant's mental and emotional problems. Counsel was arguing for a life sentence. (Exhibit B, pgs. 757-758).

The record further shows that counsel objected to certain aggravating factors presented by the State. Counsel objected to aggravating circumstances testimony regarding Defendant terrorizing the victim (Exhibit B, pgs. 738-746); counsel objected that Defendant's conviction for battery on a law enforcement officer did not meet the statutory definition as a felony involving violence (Exhibit B, pgs. 868-872); counsel argued to exclude additional aggravating testimony that Defendant had tried to terrorize the victim by removing her underwear (Exhibit B, pgs. 740-743); counsel attempted to argue that the court would be impermissibly doubling aggravators by instructing the jury that it could find the Defendant's killing both heinous, atrocious and cruel and cold, calculated and premeditated (Exhibit B, pgs. 887-889); and objected against the aggravator that Defendant murdered the victim for pecuniary gain (Exhibit B, pgs. 872-883).

Trial counsel's legitimate, sufficient, and able efforts could not establish mitigating factors sufficient to overcome the aggravating factors proven by the State: (1) Defendant had prior convictions for two violent felonies, armed robbery and battery on a law enforcement officer; (2) the murder occurred in a heinous, atrocious and cruel manner; (3) Defendant murdered in a cold, calculated and premeditated manner; (4) the murder occurred during the course of a kidnapping; and (5) Defendant murdered for pecuniary gain. (Exhibit E). The Court finds that trial counsel did present substantial mitigating evidence at the

penalty phase and rendered reasonably effective assistance of counsel. Based upon the overwhelming evidence that Defendant committed an aggravated murder, Defendant cannot demonstrate that but for the alleged errors he would have received a life sentence. See, **Hildwin**, **supra**. The factual allegations of Defendant are conclusively rebutted by the record, as referenced herein, which shows that Defendant was not prejudiced by any deficiency of trial counsel.

3.) In the alternative, Defendant argues that counsel's concession of guilt without an express waiver by Defendant on the record constitutes ineffective assistance of counsel per se under **United States v. Cronic**, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Defendant claims that **Cronic** obviates the necessity of demonstrating prejudice, which is normally required for an ineffective assistance of counsel claim.

In **Cronic**, the United States Supreme Court held that when surrounding circumstances justify a presumption of ineffectiveness, a Sixth Amendment claim can be sufficient without inquiring into counsel's performance. Such circumstances arise when a defendant is denied presence of counsel at a critical stage in the prosecution, or when there is a breakdown in the adversarial process that would justify a presumption that a defendant's conviction was not reliable. **Id.** at 2046-2049. **Cronic** applies to a narrow spectrum of cases where counsel's ineffectiveness was so egregious that the defendant was in effect denied any meaningful assistance at all. See also, **Chadwick v. Green**, 740 F.2d 897 (11th Cir. 1984). Apart from circumstances of that magnitude, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt. **Cronic**, **supra**, at 2047 (citing **Strickland v. Washington**, 466 U.S. at 693-696, 104 S.Ct. at 2067-2069).

As evidenced by the court record cited in the above paragraphs, this case is not one in which the surrounding circumstances justify a presumption of ineffectiveness. There is no allegation that Defendant was denied assistance of counsel in his defense. **Cronic**, **supra**, at 2044. Neither the deficiency alleged, nor the record of the trial reveal a breakdown in the adversarial process that would justify a presumption that Defendant's conviction was not sufficiently reliable to satisfy the Constitution. **Cronic**, **supra**, at 2049. Because defense counsel's concession of guilt, to try to retain sympathy during the penalty phase, is an acceptable defense strategy, Defendant is required to show prejudice. This reasoning is consistent with other courts that have applied the **Strickland** standard for ineffective assistance of counsel claims, which requires prejudice, to similar defense strategies. See, **Magill v. Dugger**, 824 F.2d 879 (11th Cir. 1987). Defense counsel's concession of guilt did not, and could not possibly have prejudiced Defendant in any way. The evidence of guilt was so overwhelming the jury would have found him guilty as charged even without such concession. For the same reasons discussed under the **Strickland**, claims, Defendant fails to show that but for counsel's errors the result of the proceeding would have been different.

4.) Defendant additionally argues that the State's failure to turn over exculpatory information in its possession before trial violated Defendant's rights under Article I, ss. 9, 16, and 17 of the Florida Constitution, Fla.R.Crim.P. 3.220, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Defendant argues that the State withheld a memorandum written by an investigator with the States Attorney's Office to an assistant state prosecutor which provided Defendant with an alibi; withheld notes contained in the State Attorney's file of pre-trial interviews which would have lent support to a defense of voluntary intoxication; and that the State failed to disclose that Defendant's brother who turned him in

was a paid information for the Leon County Sheriff's Department.

In order to establish a **Brady** violation, the Defendant must alleged specific facts which, if proven, would establish that had the evidence been disclosed a reasonable probability exists that the outcome of the proceedings would have been different. See, **Mills v. State**, 684 So.2d 801 (Fla. 1996); **Hegwood v. State**, 575 So.2d 170 (Fla. 1991). Even if proven at an evidentiary hearing, the facts allegedly constituting **Brady** material are insufficient to justify the relief sought. This alleged **Brady** material is simply insufficient to show a reasonable probability that the outcome of the trial could have been different had the evidence been presented to the jury. The evidence of Defendant's guilt was so overwhelming, the outcome of this trial would not likely have been different had the jury been provided this additional information. Confidence in the outcome of the proceedings is not undermined by the failure to disclose such evidence as alleged. See, **White v. State**, 664 So.2d 242 (Fla. 1995).

5.) Defendant further alleges that newly discovered evidence establishes that the victim may not have been abducted from the mall by force, that Wanda Robinson and John Nixon, Jr., gave separate statements to the sheriff's office that were never reported or disclosed to the defense, that John Nixon may either have had more involvement in the crime than known at trial or actually committed the crime, that John Nixon was a paid informant, and that the State obtained a statement allegedly made by Defendant to Detective Livings in violation of his right to counsel.

To qualify as newly discovered evidence, the evidence must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known the asserted facts by the use of diligence. See, **Jones v. State**, 591 So.2d 911 (Fla. 1991).

Most of the evidence cited by Defendant was available at trial. In any event, the evidence is not sufficient to show that if admitted on retrial it would probably produce an acquittal. See, **Williamson v. Dugger**, 651 So.2d 84 (Fla. 1994); **Mills**, **supra**; See also, **United States v. Reed**, 887 F.2d 1398 (11th Cir. 1989) (stating that newly discovered evidence must not be merely cumulative or impeaching). As to the statement made by Defendant to Detective Livings, this issue has already been addressed earlier in this order.

Accordingly, it is therefore

ORDERED AND ADJUDGED that the Defendant's Motion for Post Conviction Relief is hereby DENIED. Defendant has thirty (30) days from the date of this order in which to file an appeal.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 22nd day of October, 1997.

/s/
L. RALPH SMITH, JR.
Circuit Judge

copies furnished to:

All Parties
State Attorneys' Office

(Certificate of Service omitted in printing)

Joe Elton NIXON, Petitioner,

v.

Harry K. SINGLETARY, Respondent,

Joe Elton NIXON, Appellant,

v.

State of Florida, Appellee,

Nos. SC93192, SC92006

Supreme Court of Florida.

Jan. 27, 2000

Rehearing Denied June 9, 2000

After his first-degree murder, kidnapping, robbery, and arson convictions and death sentence were affirmed on direct appeal, 572 So.2d 1336, defendant sought postconviction relief. The Circuit Court, Leon County, L. Ralph Smith, Jr., J., denied motion. Defendant appealed and petitioned for writ of habeas corpus. The Supreme Court held that: (1) remand was required to permit trial court to determine whether defendant consented to trial strategy in which counsel conceded guilt, and (2) presumption of ineffective assistance arising from concession of guilt could only be overcome by showing of defendant's affirmative, explicit acceptance of that strategy.

Remanded.

Harding, C.J., concurred and filed a separate opinion in which Anstead and Pariente, JJ., concurred.

Anstead, J., concurred specially and filed a separate opinion.

Wells, J., dissented and filed a separate opinion.

Lewis, J., dissented.

Jonathan Lang, New York, New York, for Petitioner/Appellant.

Robert A. Butterworth, Attorney General, and Richard B. Martell, Chief, Capital Appeals, Tallahassee, Florida, for Respondent/Appellee.

PER CURIAM.

Joe Elton Nixon, a prisoner under sentence of death, appeals the trial court's order denying his Florida Rule of Criminal Procedure 3.850 motion for postconviction relief. Nixon also petitions this Court for a writ of habeas corpus. We have jurisdiction pursuant to article V, section 3(b)(1) and (9) of the Florida Constitution. For the reasons explained below, we remand this case to the circuit court to hold an evidentiary hearing on Nixon's ineffective assistance of counsel claim.

Nixon was convicted of first-degree murder, kidnapping, robbery, and arson. He was sentenced to death for the first-degree murder conviction. On appeal, this Court affirmed the conviction and sentences, including the death sentence. See Nixon v. State, 572 So.2d 1336 (Fla. 1990).

Nixon filed a rule 3.850 motion, which the trial court denied without an evidentiary hearing. Nixon appeals the trial court's denial of his motion for postconviction relief. He also petitions this Court for a writ of habeas corpus. Nixon raises

seven issues relating to the trial court's denial of his rule 3.850 motion.[1] He raises three issues in his petition for writ of habeas corpus.[2] We find the resolution of one issue to be dispositive in this case: whether Nixon's trial counsel was ineffective during the guilt phase of the trial.

Nixon's trial counsel made the following remarks during his opening statement in the guilt phase:

> In this case, there was be no question that Jeannie [sic] Bickner died a horrible, horrible death. Surely she did and that will be shown to you. In fact, that horrible tragedy will be proved to your satisfaction beyond any reasonable doubt.
>
> In this case, there won't be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie [sic] Bickner's death. Likewise,

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[1] Nixon argues the following claims relating to the trial court's denial of his 3.850 motion: (1) the circuit court denied him a full and fair hearing on his ineffective assistance of counsel claim; (2) he was denied his rights not to be tried while mentally incompetent; (3) his death sentence must be set aside because his counsel failed to make an effective argument for sparing his life and presented evidence that was harmful to his case during the sentencing phase of the trial; (4) he was denied a competent mental health evaluation in violation of Ake v. Oklahoma, 470 U.S. 68 (1985); (5) he is entitled to prove his claims under Johnson v. Mississippi, 486 U.S. 578 (1988), that the two prior convictions used as aggravating circumstances lacked validity; (6) he should have the opportunity to prove that race discrimination tainted his conviction and death sentence; and (7) the jury weighed invalid and unconstitutionally vague aggravating circumstances in violation of James v. State, 615 So.2d 668 (Fla. 1993), and Jackson v. State, 648 So.2d 85 (Fla. 1994).

[2] Nixon presents the following claims in his habeas petition: (1) appellate counsel failed to raise on direct appeal any issue regarding Nixon's competence to stand trial; (2) appellate counsel failed to properly preserve Nixon's claims under Ake v. Oklahoma; and (3) appellate counsel failed to properly preserve Nixon's claims under James v. State, and Jackson v. State.

> that fact will be proved to your satisfaction beyond any reasonable doubt. This case is about the death of Joe Elton Nixon and whether it should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement.

Nixon, 572 So.2d at 1339. During his closing argument, Nixon's counsel said:

> Ladies and gentlemen of the jury, I wish I could stand before you and argue that what happened wasn't caused by Mr. Nixon, but we all know better. For several very obvious and apparent reasons, you have been and will continue to be involved in a very uniquely tragic case. In just a little while Judge Hall will give you some verdict forms that have been prepared. He'll give you some instructions on how to deliberate this case. After you've gotten those forms and you've elected your foreperson and you've done what you must do, you will sign those forms. I know you are not going to take this duty lightly, and I know what you will decide will be unanimous. I think that what you will decide is that the State of Florida, Mr. Hankinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson.

Id. Nixon argues that these comments were the equivalent of a guilty plea by his attorney. He claims that he did not give his attorney consent to enter a guilty plea or agree to allow his attorney to undertake a trial strategy in which guilt would be

admitted.[3] Nixon claims that as a result of these comments, he was denied effective representation.

On direct appeal, this Court addressed this issue and remanded the case to the trial court for an evidentiary hearing to determine whether counsel had received Nixon's consent to use this trial strategy:

> Over Nixon's objection, this Court remanded to the trial court for an evidentiary hearing to determine whether Nixon was informed of the strategy to concede guilt and seek leniency. Order of October 4, 1988, clarifying the procedure to be followed in connection with the evidentiary hearing, the defendant was allowed to present witnesses but the state was not. The state's cross-examination of Mr. Corin, Nixon's trial counsel, was limited to the scope of direct examination by the defense. Because the trial court did not interpret the order of October 4, 1988, as requiring him to make findings or conclusions, none were made. On further remand by order of February 1, 1989, the state was allowed to present witnesses. However, the state's examination of Mr. Corin was extremely limited due to his refusal to testify concerning matters not already addressed during his testimony for the defense absent Nixon's waiver of the attorney-client privilege. Nixon refused to waive the privilege and the state was unable to fully examine Mr. Corin.

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[3] Nixon voluntarily absented himself from the courtroom during his trial. Hence, he was not present when his attorney made the statements in question.

Id. at 1339-40. This Court eventually declined to rule on the matter:

> We recognize the confusion resulting from our remand for these atypical proceedings and decline to dispose of this claim on the present state of the record which we view as less than complete. Accordingly, we do so without prejudice to raise the issue in a later motion to vacate pursuant to Florida Rule of Criminal Procedure 3.850.

Id. at 1340 (footnote omitted).

We begin our analysis by reiterating that the Sixth Amendment of the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. Amend VI.[4] The United States Supreme Court has stated that "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for its affects his ability to assert any other rights he may have." United States v. Cronic, 466 U.S. 648, 654 (1984) (quoting Walter V. Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956)).

In addition to the right to effective assistance of counsel, "the Due Process Clause [of the Fourteenth Amendment] protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). The State bears the burden of making this

[4] "In Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), the Court held that the Sixth Amendment right to counsel was incorporated into the due process clause [of the Fourteenth Amendment] and would apply to the states in all felony prosecutions." Vagner v. Wainwright, 398 So.2d 448, 450 (Fla. 1981).

demonstration. See Speiser v. Randall, 357 U.S. 513, 526 (1958).

The parties are in disagreement regarding the appropriate standard of review in this case. The State urges this Court to apply Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, in order to establish an ineffective assistance of counsel claim, a defendant must demonstrate (1) deficient performance by counsel and (2) prejudice to the defense. Nixon, on the other hand, argues that counsel's conduct in this case amounted to per se ineffective assistance of counsel, and that United States v. Cronic is the proper test. In Cronic, decided the same day as Strickland, "the Supreme Court created an exception to the Strickland standard for ineffective assistance of counsel and acknowledged that certain circumstances are so egregiously prejudicial that ineffective assistance of counsel will be presumed." Stano v. Dugger, 921 F.2d 1125, 1152 (11th Cir. 1991) (en banc). The Supreme Court stated:

> Moreover, because we presume that the lawyer is competent to provide the guiding hand that the defendant needs, see Michel v. Louisiana, 350 U.S. 91, 100-101 1955), the burden rests on the accused to demonstrate a constitutional violation. There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.
>
> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth

> Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in Davis v. Alaska, 415 U.S. 308 (1974), because the petitioner has been "denied the right to effective cross-examination" which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" Id., at 318 (citing Smith v. Illinois, 390 U.S. 129, 131 (1968), and Brookhart v. Janis, 384 U.S. 1, 3 (1966).

Cronic, 466 U.S. at 658-59 (emphasis added).

We emphasize that the Strickland standard normally applies to ineffective assistance of counsel claims. Cronic only applies to the narrow spectrum of cases where the defendant was completely denied effective assistance of counsel. See Chadwick v. Green, 740 F.2d 897, 900 (11th Cir. 1984).

To determine which test applies, we must first decide whether Nixon's trial counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." Cronic, 466 U.S. at 659. Trial counsel's statements during opening and closing arguments raise a question as to whether Nixon's trial counsel did, in fact, fail to subject the State's case to meaningful adversarial testing. See United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991) ("Mr. Ochoa's statements lessened the Government's burden of persuading the jury that Swanson was the perpetrator of the bank robbery[,] . . . tainted the integrity of the trial[,] . . . [and] was an abandonment of the defense of his client at a critical stage of the criminal proceedings.");[5] Osborn

[5] The Swanson court also stated:

> The circumstances presented in this matter demonstrates the constructive absence of an attorney dedicated to the protection of his client's rights under our adversarial system of justice. Once Swanson's court appointed attorney

> told the jury that there was no reasonable doubt regarding his client's identity as the perpetrator of the crime charged against him, he ceased to function as defense counsel. "An effective attorney 'must play the role of an active advocate, rather than a mere friend of the court.'" Osborn, 861 F.2d at 624 (quoting Evitts v. Lucey, 469 U.S. 387, 394, 105 S.Ct. 830, 835, 83 L.Ed.2d 821 (1985)). Instead of serving as his client's advocate during closing argument, Mr. Ochoa abandoned his client at a critical stage of the proceedings and affirmatively aided the prosecutor in her efforts to persuade the jury that there was no reasonable doubt that Swanson was the person who intimidated the victims and robbed the bank.
>
> Mr. Ochoa's abandonment of his duty of loyalty to his client by assisting the prosecutor also created a conflict of interest. In Osborn, the Tenth Circuit commented as follows:
>
> > A defense attorney who abandons his duty of loyalty to his client and effectively joins the state in an effort to attain a conviction or death sentence suffers from an obvious conflict of interest. Such an attorney, like unwanted counsel, "'represents' the defendant only through a tenuous and unacceptable legal fiction." Faretta v. California, 422 U.S. 806, 821, 95 S.Ct. 2525, 2534, 45 L.Ed.2d 562 (1975). In fact, an attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition.
>
> 861 F.2d at 629.
>
> The Government has failed to identify any strategy that can justify Mr. Ochoa's betrayal of his client. "[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt." Cronic, 466 U.S. at 656-57 n. 19, 104 S.Ct. at 2045-46 n. 19. By arguing that no reasonable doubt existed regarding the only factual issues in dispute, Mr. Ochoa snouldered part of the Government's burden of persuasion.
>
> We cannot envision a situation more damaging to an accused than to have his own attorney tell the jury that there is no reasonable doubt that his client was the person who committed the conduct that constituted the crime charged in the indictment.

v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988) ("[A]n attorney who adopts and acts upon a belief that his client should be convicted 'fail[s] to function in any meaningful sense as the Government's adversary.'"). Therefore, if Nixon can establish that he did not consent to counsel's strategy, then we would find counsel to be ineffective per se and Cronic would control. We agree with the reasoning of Wiley v. Sowders, 647 F.2d 642, 650 (6th Cir. 1981), where the Sixth Circuit Court of Appeals stated:

> Although statements made by attorneys in closing arguments are not evidence, nevertheless, for all practical purposes, counsel's admission of guilt on behalf of his client denied to petitioner his constitutional right to have his guilt or innocence decided by the jury. Petitioner, in pleading not guilty, was entitled to have the issue of his guilt or innocence presented to the jury as an adversarial issue. Counsel's complete concession of petitioner's guilt nullified the adversarial quality of this fundamental issue.

Under Cronic, a defendant need not show prejudice; prejudice is presumed. See 446 U.S. at 658-60. See also State v. Harbison, 337 S.E.2d 504, 507 ("[W]hen counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed."). On the other hand, if Nixon did consent to trial counsel's strategy, then it could not be said that trial counsel was ineffective, and Nixon would not be entitled to relief on this claim.

We recognize that in certain unique situations, counsel for the defense may make a tactical decision to admit guilt during the guilt phase in an effort to persuade the jury to spare the defendant's life during the penalty phase. Of course, in such cases, the dividing line between a sound defense strategy and

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943 F.2d at 1075 (emphasis added).

ineffective assistance of counsel is whether or not the client has given his or her consent to such a strategy. See Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983); Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981); Jones v. State, 877 P.2d 1052 (Nev. 1994); State v. Anaya, 592 A.2d 1142 (N.H. 1991); State v. Harbison, 337 S.E.2d 504 (N.C. 1995).

Although an attorney has the right to make tactical decisions regarding trial strategy, see Faretta v. California, 422 U.S. 806, 820 (1975), the determination to plead guilty or not guilty is a matter left completely to the defendant. See Jones v. Barnes, 463 U.S. 745, 751 (1983) ("It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal . . . ."); Brookhart v. Janis, 384 U.S. 1 (1966) (stating that although an attorney can make tactical decisions as to how to run a trial, the Due Process Clause does not permit an attorney to admit facts that amount to a guilty plea without the client's consent). At his arraignment, Nixon entered a "not guilty" plea. By pleading "not guilty," Nixon exercised his right to make a statement in open court that he intended to hold the State to strict proof beyond a reasonable doubt as to the offenses charged. See Byrd v. United States, 342 F.2d 939, 941 (D.C. Cir. 1965); Licata v. State, 81 Fla. 649, 88 So. 621, 622 (1921). "Unquestionably, the constitutional right of a criminal defendant to plead 'not guilty,' or perhaps more accurately not to plead guilty, entails the obligation of his attorney to structure the trial of the case around his client's plea." Wiley, 647 F.2d at 650.

Thus, the dispositive issue in this case is whether Nixon gave his consent to his trial counsel to concede guilt during the guilt phase of the trial. Because Nixon previously invoked the attorney-client privilege, the 1990 Court was unable to get the answer to this question. Essentially, the 1990 Court issued an invitation to Nixon to raise this issue again in his 3.850 motion. Implicit within that invitation was that the postconviction circuit

court conduct another evidentiary hearing, without the risk of the attorney-client privilege, to determine whether Nixon consented to the strategy. Despite this, the circuit court in the present postconviction motion refused to grant an evidentiary hearing, and this Court still does not have the answer that it has been seeking for the last eleven years. Therefore, we remand this case for an evidentiary hearing on this issue. Due process demands this result.

In Boykin v. Alabama, 395 U.S. 238 (1969), the Supreme Court held that a defendant may not enter a guilty plea unless that plea is intelligent and voluntary:

> A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment. See Kercheval v. United States, 274 U.S. 220, 223. Admissibility of a confession must be based on a "reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant." Jackson v. Denno, 378 U.S. 368, 387. The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation. In Carnley v. Cochran, 369 U.S. 506, 516, we dealt with a problem of waiver of the right to counsel, a Sixth Amendment right. We held: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, than an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."
>
> We think that the same standard must be applied to determining whether a guilty plea is voluntarily made. For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality. The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards. Douglas v. Alabama, 380 U.S. 415, 422.

Id. at 242-43 (footnote omitted). Consequently, this Court has stated that "[d]ue process requires a court accepting a guilty plea to carefully inquire into the defendant's understanding of the plea, so that the record contains an affirmative showing that the plea was intelligent and voluntary." Koenig v. State, 597 So.2d 256, 258 (Fla. 1992). See also Fla. R. Crim. P. 3.172.

Because counsel's comments were the functional equivalent of a guilty plea, we conclude that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough. We also make clear that pursuant to Nixon's ineffective assistance of counsel claim, Nixon has waived the attorney-client privilege. See Reed v. State, 640 So.2d 1094, 1097 (Fla. 1994) ("Thus, it is clear that conversations between the defendant and his or her trial lawyer relevant to ineffective assistance of counsel are not protected by the attorney-client privilege."); Sec. 90.502(4)(c), Fla. Stat. (1999).

We recognize that Nixon was very disruptive and uncooperative at trial. In light of this, as well as the overwhelming evidence in this case, it has been suggested that the strategy employed by Nixon's trial counsel represented Nixon's best chance of receiving a life sentence, and, therefore, counsel should not be faulted or deemed ineffective. Indeed,

counsel's strategy may have been in Nixon's best interest. Nevertheless, the Supreme Court has made it clear that the defendant, not the attorney, is the captain of the ship. See Jones; Brookhart. Although the attorney can make some tactical decisions, the ultimate choice as to which direction to sail is left up to the defendant. The question is not whether the route taken was correct; rather, the question is whether Nixon approved of the course.

It has also been suggested that absent this strategy, Nixon's counsel had no other options. We disagree. In every criminal case, a defense attorney can, at the very least, hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt. Without Nixon's consent to do otherwise, this should have been the strategy utilized by defense counsel. If this strategy worked to Nixon's detriment, Nixon himself must bear the responsibility for that decision. Cf. Faretta, 422 U.S. at 834 ("The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. . . . And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'") (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring).

Finally, in order to avoid similar problems in the future, we hold that if a trial judge ever suspects that a similar strategy is being attempted by counsel for the defense, the judge should stop the proceedings and question the defendant on the record as to whether or not he or she consents to counsel's strategy. See Wiley, 647 F.2d at 650 ("In those areas where counsel advises his client that the latter's guilt should be admitted, the client's knowing consent to such trial strategy must appear outside the presence of the jury on the trial record in the manner consistent with Boykin."); State v. House, 456 S.E.2d 292, 297 (N.C. 1995)

("Further, we take this opportunity to urge both the bar and the trial bench to be diligent in making a full record of a defendant's consent when a Harbison issue arises at trial."). This will ensure that the defendant has in fact intelligently and voluntarily consented to counsel's strategy of conceding guilt.

Accordingly, for the reasons stated in this opinion, we remand this case to the circuit court to hold an evidentiary hearing on the issue of whether Nixon consented to defense counsel's strategy to concede guilt. In light of our disposition of Nixon's 3.850 appeal, we do not address his habeas claims at this time.

It is so ordered.

HARDING, C.J., and SHAW, ANSTEAD and PARIENTE, JJ., concur.

HARDING, C.J., concurs with an opinion, in which ANSTEAD and PARIENTE, JJ., concur

ANSTEAD, J., specially concurs with an opinion.

WELLS, J., dissents with an opinion.

LEWIS, J., dissents.

HARDING, C.J., concurring.

"We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." U.S. Const. preamble (emphasis added). As exemplified by the Preamble to this nation's Constitution, justice is the very foundation upon which our

system of government was built. Inherent within the concept of justice is the fair processing of cases. Black's Law Dictionary provides the following definition of justice:

> Proper administration of laws. In jurisprudence, the constant and perpetual disposition of legal matters or disputes to render [all persons their] due.

Black's Law Dictionary 864 (6th ed. 1990) (emphasis added) [sic]. Consequently, the term "due process of law" has developed to mean:

> A course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the enforcement and protection of private rights.

Id. at 500.

Prior to this nation's birth, the colonists were subjected to a system of government that denied individual rights and liberties and failed to provide due process. Based on their experience with the English monarchy and its courts, the founders of this country were determined to ensure that a number of individual rights and liberties were specifically provided for within the body of the Constitution. Today these rights include the right to have effective assistance of counsel in criminal matters, the right against self-incrimination, the right to an impartial jury, the right to a fair trial, the right to confront one's accusers, the right to be presumed innocent until proven guilty, and the right that the government prove a criminal matter beyond a reasonable doubt. These rights are available to all citizens, regardless of race, creed, or social status. History has shown that it is only when due process is strictly adhered to that judicial outcomes are credible. It has been said a number of times that it is more important that no innocent man be convicted than a

guilty man go free. See In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free."); Furman v. Georgia, 408 U.S. 238, 367 n.158 (1972) (Marshall, J., concurring) ("[I]t is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned.") (quoting William O. Douglas, Foreword to Jerome Frank & Barbara Frank, Not Guilty 11-12 (1957)).

I share and understand the frustration of my colleagues in dissent. This is a difficult case for several reasons, not the least of which is the substantial evidence of the defendant's guilt. I do not question the competence or experience of trial counsel. Neither do I underestimate the frustration counsel must have experienced with such a disruptive and uncooperative client. Nor do I question that the strategy taken by defense counsel was an effective one reasonably calculated to help the defendant avoid the death penalty. Yet, I cannot accept that substantial evidence of guilt, a disruptive client, and an effective trial strategy can preempt the constitutional right of a defendant to the presumption of innocence and the requirement that a guilty plea be knowingly and intelligently entered. A plea of guilty cannot be entered to a judge or a jury without the defendant's consent. It is not a theoretical gloss or a hypothetical exercise to require that a defendant, no matter how gruesome or horrible his crime, how guilty he is, or how good the trial strategy, be accorded those rights. The courts have consistently required a judge to make inquiry and determine that a guilty plea is voluntarily, intelligently, and freely entered. We have developed a detailed rule setting forth specific procedures that courts must follow in making this determination. See Fla. R. Crim. P. 3.172. My research has not revealed a case where the failure to ensure that a defendant's plea of guilty was voluntary and intelligently entered was error subject to a harmless error analysis.

In the absence of certain knowledge of whether Nixon consented to counsel's strategy, the process for determining guilt

or innocence was utterly flawed in this case. If Nixon did not consent, then a number of his constitutional rights were violated: he did not have a fair trial, he did not have effective representation, he was not seen as innocent until proven guilty, and the government was not held to its burden of establishing its case beyond a reasonable doubt. Despite his difficult behavior, Nixon was still entitled to his constitutional rights. Without the benefit of these rights, we can place no credence in the jury's verdict of guilt in this case. Any other conclusion would rend the very fabric from which our justice system was woven.

Aside from the merits, this case is troublesome because of the length of time it has taken for this Court to get to this point. The trial in this case occurred in 1985, yet the trial court's ruling on the 3.850 petition was not ripe for our review until the end of 1998. However troubling this may be, the amount of time this case has taken should in no way bear upon our ultimate decision on the merits. No defendant should be denied the relief required simply because of delay.

For these reasons, I concur with the majority opinion.

ANSTEAD and PARIENTE, JJ., concur.

ANSTEAD, J., specially concurring.

I concur in Chief Justice Harding's opinion. The outcome of this case is controlled by the holding of the United States Supreme Court:

> [E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt.

Cronic, 466 U.S. at 656-57 n.19 (emphasis supplied). Obviously, a decision to "stand trial" was made here.

As to the issue concerning counsel's decision to, in essence, enter a plea of guilty without Nixon's consent, the dissent reminds us of the adage that "hard cases make bad law." When we decide cases, we must do so in accord with rules of law that apply to all cases, and therein lies one of the principle flaws in the dissenting opinion. That opinion fails to acknowledge, much less discuss, the rule of law concerning the entry of a guilty plea, and counsel's role and responsibility to her client if counsel believes that a guilty plea should be entered. Instead, it simply concludes this was a hopeless case with horrible facts; therefore, counsel should be free to do anything, including pleading the defendant guilty without the consent of the defendant.[6] As to the law, while the dissent apparently concludes that this defendant's case is hopeless, it ignores the cases to come, especially the ones that will arise if we were to adopt a rule of law that says counsel can make the decision as to a plea of guilty without the consent of the client. That is part of the "bad law" that would come from this "hard case" if we accepted the dissenting view.

The dissent also ignores the fact that the postconviction proceedings and enlargement of the record we previously mandated have never occurred. On direct appeal, we refused to deal with the competency of counsel claim because of the inadequacy of the record and with the express provision that it would be more properly resolved in a postconviction proceeding. See Nixon v. State, 572 So.2d 1336, 1340 (Fla. 1990). We know this not only because we expressly said so in Nixon, but also because we had the same issue arise in a subsequent case where we cited our holding in Nixon as one requiring an evidentiary

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[6] In fact, the procedure advocated by the dissent here would be much worse and more prejudicial than the entry of a formal plea of guilty, because at least a formal plea would have foreclosed the State from presenting, during a trial on guilt, the extensive devastating evidence of guilt alluded to by the dissent. The kind of "guilty plea" allowed here to be entered by counsel alone gave the defendant the worst of all worlds: an admission of guilt plus the devastating evidence put on by the State during a guilt phase trial that was rendered unnecessary by counsel's guilty plea.

hearing in a postconviction action. See Harvey v. Dugger, 656 So.2d 1253, 1256 (Fla. 1995). By approving the trial court's decision, we would be concluding that the same record that was declared inadequate by a unanimous court in 1990 has now become adequate to resolve this issue, and we would be overruling the holding of a unanimous court in the 1990 opinion. Further, we would be ignoring our prior explicit mandate in this very case, and ruling now, as a matter of law, that a lawyer is authorized to concede a defendant's guilt regardless of the defendant's views or input.

The record presented to us also reflects a serious issue as to Nixon's competency. Nixon's competency to stand trial first became an issue when he stood trial on an unrelated assault and battery charge five months before his murder trial.[7] At that trial, Nixon's attorney raised the issue of his client's competency. That prompted the judge to request a psychologist, Dr. Carolyn Stimel, to examine Nixon. This examination occurred during the lunch hour of the proceedings and last approximately forty-five minutes. The evaluation did not consist of any psychological testing nor was a formal competency evaluation made. Notwithstanding, the assault trial continued.

The next time that Nixon's competency was discussed was during a pretrial conference in the murder case. At this pretrial conference, the state attorney was concerned about Nixon's competency and urged an examination. There is also evidence that months before trial, Dr. Ekwall opined that Nixon's intelligence was "on the low side of normal, but its adequate." Finally, in 1993, Nixon was examined by three different mental health experts, all three of whom opined that Nixon suffers from mental retardation and may have some form of organic brain damage or organic personality disorder. Despite

[7] This assault trial involved the same counsel and was conducted before the same judge who presided over his murder trial.

these concerns, however, both parties essentially concede that no competency hearing was ever conducted.

Specifically, Dr. Henry Lee concluded that Nixon suffers from mental retardation and shows unmistakable evidence of Organic Personality Disorder. After evaluating Nixon, he found it surprising that no formal competency hearing was conducted in this case, especially given Nixon's bizarre conduct and statements prior to and during trial. He also found that in addition to the record information, the affidavits of several people, including an attorney skilled in defending the mentally ill, attest to Nixon's psychotic behavior. Dr. Denis William Keyes also concluded that Nixon is mentally retarded and suffers from evident brain damage. The psychological tests administered to Nixon place him below the lowest one percent of the population. Finally, Dr. Alec J. Whyte opined that Nixon suffers from mental retardation and an organic personality disorder. He specifically noted that the process of a criminal trial was beyond Nixon's competence to comprehend, and that his behavior during the trial is evidence of his inability to comprehend what was occurring.

All three of these opinions were based in part on Nixon's behavior before and during trial. This behavior included Nixon's refusal to leave his cell during pretrial hearings, the removal of his clothing, and his hiding under the sheets of his bed when summoned by officials. Furthermore, two months before trial, Nixon wrote an incoherent letter to his attorney that appeared to demonstrate a severe mental imbalance.

Based primarily on the above evidence and evaluations of the mental health experts, Nixon alleged in his 3.850 motion that he was not competent to stand trial. Notwithstanding, the trial court summarily denied this claim, finding it procedurally barred. However, the record does not support this conclusion. On the contrary, the record reflects that at the very least, Nixon was entitled to an evidentiary hearing on whether he was

competent to stand trial. See Peede v. State, 24 Fla.L.Weekly S391, S393 (Fla. Aug. 19, 1999); Jones v. State, 478 So.2d 346 (Fla. 1985). In fact, the State concedes that because the judge, prosecutor, and defense counsel in this case, as well as some of the experts who evaluated Nixon contemporaneously with the time of trial and who opined that a competency hearing was not necessary, are still available, a nunc pro tunc hearing could be held in this case. See Mason v. State, 489 So.2d 734 (Fla. 1986).

WELLS, J., dissenting.

I dissent.

A thorough review of the record and a plain reading of our opinion in Nixon's direct appeal leads me to the inescapable conclusion that Nixon's claim of ineffective assistance of counsel is governed by Strickland v. Washington, 466 U.S. 668 (1984). Competent, substantial evidence supports the trial court's summary denial of Nixon's claim.

I begin my analysis with reference to the facts as set forth in this Court's opinion in Nixon v. State, 572 So.2d 1336 (Fla. 1990):

> At trial, there was testimony that after church on August 12, 1984, Ms. Bickner went to a local mall to have lunch with friends. She parked her orange M.G. convertible in the mall parking lot. Ms. Bickner was later seen in the parking lot giving a black man jumper cables from the trunk of her car. Witnesses testified that on the afternoon of August 12 they saw the orange M.G. driven by a black male, later identified as Nixon, near the vicinity of the site where the body was found. Ms. Bickner's body was discovered by a couple riding through the woods who reported the incident to the police.

> The charred body was in a seated position tied around the waist with jumper cables to a pine tree. Her left arm was tied to another pine tree. Wanda Robinson, John Nixon and other witnesses testified that they saw Nixon driving Ms. Bickner's orange M.G. Robinson and John Nixon also testified that Nixon admitted killing a white woman by tying her with jumper cables and burning her. Nixon also showed them two of Ms. Bickner's rings and later said he had pawned the rings. Robinson and John Nixon also testified that on the morning of the fourteenth, Nixon told them that he was going to burn the orange M.G. There was testimony that Nixon attempted to sell the M.G. prior to burning it. A pawn shop receipt signed by Nixon for two of Ms. Bickner's rings was entered into evidence. A laboratory analyst for the Florida Department of Law Enforcement testified that Nixon's palm print was found on the trunk lid of Ms. Bickner's M.G.
>
> After his arrest, in a taped confession which was played to the jury, Nixon admitted murdering Ms. Bickner. He described how he met Ms. Bickner at the mall and asked her to take him to his uncle's house because he was having car trouble. Once on the road, Nixon hit Bickner in the face. When she stopped the car, Nixon put her in the trunk and then drove to a secluded wooded area where he took her from the trunk and tied her to a tree with jumper cables. According to Nixon, the two talked about their lives. Ms. Bickner offered to give Nixon money, to sign her car over to him, begging him not to kill her. Nixon recounted how he burned Ms. Bickner's personal belongings and then threw the top of the convertible into the fire. At some point

> after placing a paper bag over her head, Nixon threw the smoldering convertible top on Ms. Bickner, setting her on fire. He then left the scene in the M.G.

572 So.2d 1338.

I next note the following statements from the two able and experienced trial judges who were involved in this case. First, is the statement of Judge hall made at the close of the proceedings in 1985:

> One facet of the case that doubtless will come under examination is the tactics, strategy, analysis employed by defense counsel in this case.
>
> Trial court is uniquely situated in our judicial system. It's the only judicial officer that sees the people that appear, and observes their demeanor, is able to see the impact that the case has upon the jury, observe that impact, and so forth, as the jury hears it. Privy to the evidence and privy to that evidence as it is presented in the courtroom.
>
> Doubtless, there may be those who have reservations about the approach employed by trial counsel for the defense in this case.
>
> It is my view that the tactic employed by trial counsel in this case was an excellent analysis of reality of his case and the preservation of his credibility and the credibility of any mitigating circumstances that could have been placed before the jury and before this Court, as to disposition.

> It is my view, in view of the evidence in this case, the jury has found the defendant guilty by the establishment of evidence beyond and to the exclusion of any reasonable doubt. I think that the evidence, preparation of the case, presentation, would have persuaded any jury, not only beyond a reasonable doubt, but beyond all doubt.
>
> For trial counsel to have inferred that Mr. Nixon was not guilty of these offenses would have deprived him of any credibility during the penalty phase, and to some extent, although professionalism would have detracted a little bit from it, under a sentencing hearing before the Court. I think the trial counsel's approach, the maintenance of credibility, his rapport with the jury, were the only realistic steps that could have been taken, in an effort to give some relief to his client.
>
> A less experienced attorney, probably seeking to avoid criticism - either public, private or professional - would have tried the case differently, and probably would have left no hope at all for Mr. Nixon.
>
> Mr. Corin's approach, his analysis, his assessment, I think was right on the mark. I think that his approach has been conscientious and in diligent best interest to defend his client, Mr. Nixon.

Second, I note the statement of Judge Smith in ruling upon Nixon's Cronic[8] claim in the postconviction proceedings.

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[8] United States v. Cronic, 466 U.S. 648, 654 (1984).

Finally, in respect to the trial record and the direct appeal, there are three matters which are crucial to my conclusion that the majority's decision is wrong:

1. Nixon was presumed to be mentally competent to stand trial. There was no determination by the trial court that he was incompetent, and no issue was raised on appeal that the trial court erred in failing to find him incompetent to proceed.

2. Nixon was extremely uncooperative during the trial. He refused to be in court on several occasions. He took off his clothes in his holding cell to thwart the proceedings. The trial judge went to the holding cell to try to get Nixon to attend and cooperate, but Nixon continued to be uncooperative.

3. Even though Nixon was voluntarily absent from much of the trial, Nixon's trial counsel actively engaged in the trial, including conducting an extensive voir dire, objecting to photographs as unduly gruesome, and moving for a mistrial as to a portion of the State's closing in the guilt phase. In the penalty phase, Nixon's trial counsel presented the testimony of eight witnesses, including Nixon's mother and two mental health experts, a psychiatrist, and a psychologist. Nixon's trial counsel introduced substantial documentary evidence, including school, institution, and psychological reports concerning Nixon's life from 1972 to 1985.

What is plainly the reality of what we have here is a gruesome, horrible murder, confessed to by a competent but obstructive defendant who had experienced trial counsel who

proceeded on the basis of a strategy which should be recognized as obviously the only rational legal strategy to try to keep a client out of the electric chair. I cannot join the majority in replacing this plain reality with a theoretical gloss that paints what occurred as if it were some hypothetical exercise which spurned constitutional rights. I cannot accept that our courts must ignore that which reasonable, objective analysis demonstrates is patently evident.

The legal issue before us is whether Nixon's claim of ineffective assistance of counsel is governed by the oft-applied test of Strickland or by dicta in Cronic, which suggests that an attorney, in remote instances, may act so detrimentally to his client's case as to result in a breakdown of the adversarial process and will be deemed prejudicial per se. If Strickland applies, rather than Cronic, then correct legal analysis dictates that the trial judge should be affirmed, not reversed, because competent, substantial evidence supports the trial court's legal ruling that Nixon has failed to establish the requisite prejudice.

I first point out that the decision of whether Cronic applies on this record was decided by this Court in 1990, when it entertained Nixon's direct appeal. Had this Court in 1990 concluded that Cronic applied, surely it would have applied it and not wasted these last nine years. The record before this Court now stands the same as the record before it when it first considered Nixon's Cronic claim in 1990. The trial court was correct in concluding that Strickland applied, for why else would the Court have sent the case on to postconviction proceedings? What the majority actually does is grant a rehearing of the 1990 decision by this Court, and that is wrong.

I also point out that the majority's decision is based on an overly expansive interpretation of Cronic. The majority's decision as to the application of Cronic is based on cases which either do not apply or cases whose reasoning have been justifiably criticized. The majority relies on cases from the Ninth

and Tenth Circuits. See United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991), Osborn v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988). The First Circuit has rightfully rejected the expansive interpretation placed on Cronic in Swanson and Osborn. In Scarpa v. Dubois, 38 F.3d 1 (1st Cir. 1994), the First Circuit considered a case in which a lawyer argued a defense on behalf of his client which was tantamount to admitting guilt:

> As mentioned above, the district court relied primarily on dictum contained in United States v. Cronic, 466 U.S. at 658-60, 104 S.Ct. at 2046-47, for the proposition that, in the circumstances at bar, it could forgo an inquiry into actual prejudice. The Cronic Court stated that in rare instances prejudice might be presumed "without inquiry into counsel's actual performance at trial." Id. at 662, 104 S.Ct. at 2048 (dictum). But, the approach suggested in this statement is in all events the exception, not the rule - and it can been employed only if the record reveals presumptively prejudicial circumstances such as an outright denial of counsel, a denial of the right to effective cross-examination, or a complete failure to subject the prosecution's case to adversarial testing. See id. at 659, 104 S.Ct. at 2047. The Cronic Court itself warned that, in most cases, a showing of actual prejudice remained a necessary element. See id. The Court stated: "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." Id. at 659 n.26, 104 S.Ct. at 2047 n.26.
>
> For the most part, courts have been cautious in invoking the exception limned in the

Cronic dictum. Cronic-like principles have been applied, for example, in situations in which defense counsel labored under an actual conflict of interest, see Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), or in which no attorney appeared despite a defendant's unwaived right to appointed counsel, see United States v. Mateo, 950 F.2d 44, 48-50 (1st Cir. 1991), or in which defendant's lawyer sat in total silence throughout the relevant proceeding, see Tucker v. Day, 969 F.2d 155, 159 (5th Cir. 1992) (involving resentencing); Harding v. Davis, 878 F.2d 1341, 1345 (11th Cir. 1989) (holding that defense counsel's muteness throughout trial, including his utter silence as the judge directed a verdict against his client, is per se prejudicial), or in which the defense attorney was absent from the courtroom during a critical part of the trial, see Green v. Arn, 809 F.2d 1247, 1259-64 (6th Cir.), cert. granted, vacated and remanded to consider mootness, 484 U.S. 806, 108 S.Ct. 52, 98 L.Ed.2d 17 (1987); Siverson v. O'Leary, 764 F.2d 1208, 1217 (7th Cir. 1985), or, pre-Cronic, in which counsel snoozed through much of the proceedings, see Javor v. United States, 724 F.2d 831, 833 (9th Cir. 1984).

A few courts have extended the exception's boundaries beyond the circumstances surrounding representation and found that a lawyer's particular errors at trial may cause a breakdown in the adversarial system and thus justify invocation of the Cronic dictum. See Swanson, 943 F.2d at 1074 (holding that knowingly and explicitly conceding reasonable doubt in closing argument is per se prejudicial); Osborn, 861 F.2d at 628-29 (finding per se

prejudice when defense counsel intentionally stressed the brutality of his client's crime, admitted that the evidence against his client was overwhelming, and made statements to the press that his client had no evidence to support his claims). We believe that these cases misperceive the rationale underlying the Cronic expression. In our view, the Court's language in Cronic was driven by the recognition that certain types of conduct are in general so antithetic to effective assistance - for example, lawyers who leave the courtroom for long stretches of time during trial are unlikely to be stellar advocates in any matter - that a case-by-case analysis simply is not worth the cost of protracted litigation. No matter what the facts of a given case may be, this sort of conduct will almost always result in prejudice. See Cronic, 466 U.S. at 658-59, 104 S.Ct. at 2046-47. But attorney errors particular to the facts of an individual case are qualitatively different. Virtually by definition, such errors "cannot be classified according to likelihood or causing prejudice" or "defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid." Strickland, 466 U.S. at 693, 104 S.Ct. at 2067. Consequently, the Court has declined to accord presumptively prejudicial status to them. See id.

We are not alone in our attempt to harmonize Cronic with Strickland by drawing an easily visible line separating those few cases in which prejudice may be presumed from the mine-run (in which actual prejudice must be shown). When confronted by particular errors on the part of defense counsel, best evaluated in the context of the defendant's trial, other federal courts have

refused to march under the Cronic banner, and, instead, notwithstanding the seriousness of the errors, have performed both parts of the requisite Strickland analysis. Thus, in McInerney v. Puckett, 919 F.2d 350 (5th Cir. 1990), the defendant claimed that his lawyer's lack of preparedness and failure to raise an insanity defense justified the invocation of the Cronic dictum. See id at 352-53. In requiring a showing of prejudice, the Fifth Circuit noted that "bad lawyering, regardless of how bad, does not support the [per se] presumption; more is required." Id. at 353; see also United States v. Thompson, 27 F.3d 671, 676 (D.C. Cir. 1994) (finding no prejudice per se in defense counsel's failure to inform defendant before guilty plea that, as a career offender, he faced possible life imprisonment); United States v. Baldwin, 987 F.2d 1432, 1437-38 (9th Cir.) (finding no prejudice per se where attorney conceded his client's guilt at pretrial conference and neglected to request jury instruction on overt act requirement for conspiracy charge), cert. denied, 508 U.S. 967, 113 S.Ct. 2948, 124 L.Ed.2d 696 (1933); Woodard v. Collins, 898 F.2d 1027, 1028 (5th Cir. 1990) (requiring showing of prejudice where defense counsel advised the accused to plead guilty to a charge that counsel had not investigated); United States v. Reiter, 897 F.2d 639, 644-45 (2nd Cir.) (applying full Strickland standard in spite of defendant's claim that counsel's errors were so pervasive as to amount to "no counsel at all"), cert. denied, 498 U.S. 990, 111 S.Ct. 533, 112 L.Ed.2d 543 (1990); Green v. Lynaugh, 868 F.2d 176, 177-78 (5th Cir.) (applying full Strickland analysis to attorney's decision to conduct "almost no investigation"),

cert. denied, 493 U.S. 831, 110 S.Ct. 102, 107 L.Ed.2d 66 (1989); Henderson v. Thieret, 859 F.2d 493, 499 (7th Cir. 1988) (applying second prong of Strickland to attorney's lack of preparation in connection with sentencing), cert. denied, 490 U.S. 1009, 109 S.Ct. 1648, 104 L.Ed.2d 163 (1989); Gardner v. Ponte, 817 F.2d 183, 186-87 (1st Cir.) (refusing to extend Cronic to attorney's failure to object to jury instructions), cert. denied, 484 U.S. 863, 108 S.Ct. 181, 98 L.Ed.2d 134 (1987); State v. Savage, 120 N.J. 594, 577 A.2d 455, 466 (1990) (finding no prejudice per se in a capital case where counsel only met once with defendant). Similarly, in reviewing claims of ineffective assistance of counsel at the appellate level, courts have declined to apply Cronic to attorney errors that do not amount to the constructive absence of counsel. See, e.g., Hollenback v. United States, 987 F.2d 1272, 1276 & n.1 (7th Cir. 1993) (finding no per se prejudice in appellate counsel's citation to wrong provision of money-laundering statute); United States v. Birtle, 792 F.2d 846, 847-48 (9th Cir. 1986) (finding no per se prejudice when defendant's appellate counsel failed to appear at oral argument or file a reply brief).

> These authorities suggest that attorney error, even when egregious, will almost always require analysis under Strickland's prejudice prong. We agree. Thus, we decline to adopt the expanded version of Cronic embraced by the district court. Our reasons are manifold, but four of them are paramount.

38 F.3d at 11-14 (footnotes omitted) (emphasis added).

The Fifth Circuit has also been critical of the Ninth Circuit with regard to that court's interpretation of Cronic. In Childress v. Johnson, 103 F.2d 1221 (5th Cir. 1997), the court held:

> While gleaning insight from Swanson's statement of Sixth Amendment principles, we do not necessarily endorse its finding of a constructive denial of counsel. Defense counsel in Swanson failed to call witnesses and conceded in his closing argument that the evidence of his client's guilt was overwhelming. These appear to be trial errors amenable to Strickland analysis. See Scarpa v. Dubois, 38 F.2d 1, 12 (1st Cir. 1994) (criticizing Swanson), cert. denied, ___ U.S. ___, 115 S.Ct. 940, 130 L.Ed.2d 885 (1995).

103 F.3d 1229 n.12 (emphasis added). In Vines v. United States, 28 F.3d 1123 (11th Cir. 1994), the Eleventh Circuit stated:

> "Cronic's presumption of prejudice applies to only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all." Chadwick v. Green, 740 F.2d 897, 901 (11th Cir. 1984).

Id. at 1128 n.8.

No fair reading of the instant record can lead to the conclusion tha. Nixon was "denied any meaningful assistance at all." Id. This case must be analyzed in light of Florida's death penalty procedure. Counsel's performance must necessarily consider both the guilt and penalty phases. The trial record demonstrates that counsel made a rational choice, one that a competent, experienced lawyer would be expected to make given

the evidence, which was to call no witnesses and emphasize the penalty phase. This was appropriately stated by Judge Hall in 1985, and this Court is wrong to ignore it in 1999.

I also dissent because I believe the majority's opinion, after more than nine years, creates a new standard for this case. The majority opinion states at page 14 (slip opinion): "[W]e conclude that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough." Is this to be "established" by a preponderance of the evidence - clear and convincing evidence - or to the exclusion of every reasonable doubt? Is a nod of the head sufficient, or does the majority actually require a Boykin[9] on-the-record acceptance to have been made? It appears to me that the majority is here dictating a new trial, only leaving to the trial judge the actual ordering of it.

This appears to me to dictate a new trial because the record has been clear for the fifteen years since this trial that during the trial Nixon set about not to "explicitly accept" anything. This was part and parcel of his disruptive and noncooperative conduct. If "explicit acceptance" per Boykin is the requirement, this Court should have so stated in 1990. If that had been correctly the issue then, this Court's majority at that time would have reversed for a new trial based on the record, which does not have a Boykin on-the-record "explicit acceptance." However, the then unanimous majority did not do that. The present new majority confuses our procedure when it in actuality rehears and sets aside that decision. I conclude that it is harmful to the processing of capital cases generally when the majority of this Court erodes the distinction between direct appeal and postconviction relief for a particular case, as is being done here.

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[9] Boykin v. Alabama, 395 U.S. 238 (1969).

Finally, I believe this case again exemplifies why this Court must have a much better and more pro-active case management procedure in capital cases. If, as the majority now holds, the record had to contain "specific testimony," there is no justifiable explanation as to why it has taken a decade to determine whether that testimony exists or to require a new trial. Since I have been on this Court, I have repeatedly advocated that this Court actively case-manage these cases following the direct appeal. This case plainly demonstrates the past-due need for this Court to implement procedures for quarterly case management conferences in the trial courts with status reports reviewed each quarter by this Court and direction through the Chief Justice to the Chief Judge or each circuit in respect to cases in which appropriate progress in the adjudication of postconviction issues is not being made.

[Volume III, Record on Appeal, Case No. SC01-2486]

[387] IN THE CIRCUIT COURT OF
THE SECOND JUDICIAL CIRCUIT IN
AND FOR LEON COUNTY, FLORIDA

CASE NO.: 84-2324

STATE OF FLORIDA,

vs.

JOE ELTON NIXON,

Defendant.
_____/

PROCEEDINGS: EVIDENTIARY HEARING

BEFORE: HONORABLE JANET E. FERRIS

DATE: Friday, May 11, 2001

LOCATION: Leon County Courthouse
Tallahassee, Florida

REPORTED BY: SONIA FANCHER, RPR
Notary Public in and for the
State of Florida at Large

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THE COURT: Gentlemen, if we could just take care of a few preliminary matters before we start, are you ready? We are a little bit early.

MR. EVANS: Mr. Corin has not made it down. He has court this morning at 8:30. So it will be a few minutes before he arrives.

MR. LANG: We have some preliminary issues also.

THE COURT: All right. Good. Let me just make sure that we are very clear on exactly what issues we are here to resolve today.

Now, my understanding is that the motion that was before Judge Smith is this motion; is that correct?

MR. FREEDMAN: That's correct, Your Honor.

THE COURT: And what I am holding up and showing to counsel is a document that is in the court file entitled Motion to Vacate Judgment of Conviction and Sentence and Consolidated Request That Leave to Amend Be Allowed. This was filed October 7th of 1993.

So this was the motion that was before Judge Smith prior to the, I guess, appeal of the motion to the Supreme Court which brings us back to – well, I guess, there were some intervening orders.

MR. EVANS: I am not aware of there being any [390] additions or changes to that particular motion.

MR. LANG: That particular motion is as filed as long as it is the one that says corrected copy. I don't know whether it does. I'm almost certain Your Honor has the right copy.

MR. EVANS: It was on one of the pages. I don't remember which page, if it was the cover sheet or one of the sheets, there was listed corrected copy. I do recall seeing that.

THE COURT: All right. I'm not sure if this one is corrected or not.

MR. EVANS: We may need to take a look at it.

THE COURT: Sure. Now, we have – let me back up a little bit too if I could. And I should for the record indicate that Mr. Nixon is present in the courtroom

And, gentlemen, if you would, each go and identify yourself for the record so everyone will be clear on who is here. Mr. Lang?

MR. LANG: Jonathan Lang from New York, New York, attorney for the defendant, Mr. Joe Elton Nixon.

MR. FREEDMAN: Eric Freedman of the New York Bar for Mr. Nixon.

THE COURT: Thank you.

[391] MR. EVANS: Eddie Evans from the State Attorney's Office.

MR. MARKY: Raymond Marky, assistant state attorney for the State.

THE COURT: Thank you, Mr. Marky.

MR. MARKY: Can you understand me okay?

THE COURT: Yes, thank you.

MR. FRENCH: Curtis French, assistant attorney general for the State also.

MR. GUARISCO: Tony Guarisco, assistant state attorney for the State.

THE COURT: Very good. I just want to make sure the record will reflect who was present here today.

MR. EVANS: Your Honor, this does not appear to be the corrected copy. When did you file the corrected copy?

THE COURT: I think there is another one in the file. We will check and see if that's the correct –

MR. EVANS: This one looks like it was filed October 7th, 1993, and I think the corrected copy was filed –

MR. LANG: Shortly thereafter, Your Honor, I believe it was filed under a deadline, and then there were some typographical errors that were corrected.

THE COURT: Is that all that was corrected [392] though, Mr. Lang, or were there any substantive corrections?

MR. LANG: Your Honor, frankly I can't remember that there were. I don't believe there were. The certificate of service on the corrected copy is the 14th of October, 1993.

THE COURT: For the record, I do now have before the corrected copy of the identical motion that I just read into the record. So I do have that.

Now, gentlemen, I have thoroughly read the Supreme Court's order. And this is the opinion in Nixon versus Singletary, 758 So.2d 618. And I'm also very familiar with Judge Smith's order and, although it's a bit confusing, the historical procedural status of the case and the, I guess, remands that had occurred between the Supreme Court and the Circuit Court here.

Now, my understanding from the Supreme Court's opinion is that we are here to determine one issue and one issue only. Is that correct, gentlemen?

MR. LANG: That's right.

THE COURT: All right. And that issue is, essentially, that Mr. Nixon did not give – or his claim is that he did not give his attorney consent to, as the Supreme Court has framed it, enter a [393] guilty plea or to agree to allow his attorney to undertake a trial strategy in which guilt would be determined. And this, obviously, pertains to the ineffective assistance of counsel claim that was raised in this motion.

Now, I am not in the least bit clear on the resolution of the other issues. I am assuming the Supreme Court found the trial court's order adequate in regard to the other claims. Well, Mr. Freedman is shaking his head. I don't know that.

But all I can tell you from my understanding of the opinion itself is that this case has been presented back to the trial court for an evidentiary hearing on that one ineffective assistance claim as it relates to the issue that I've just described.

Is that your understanding, Mr. Lang?

MR. LANG: Your Honor, yes, we agree with half of what you said. With respect to the unresolved issues, it is our view that they are held in abeyance.

But the resolution of that here is not necessary because you're absolutely correct, the issue is whether or not he affirmatively agreed to the concession of guilt.

THE COURT: Okay.

[394] MR. MARKY: Excuse me. May I be heard?

THE COURT: Absolutely.

MR. MARKY: Your Honor, following the Florida Supreme Court's decision, the State of Florida sought certiorari review in the United States Supreme Court contesting the legal decision of the Florida Supreme Court.

Counsel filed a reply in which he took the position that it was all premature, the issues that we were presenting were premature because all the Florida Supreme Court did was remand it for an evidentiary hearing.

Now, we believe that because it's been remanded to decide the issues we have a right to preserve the record in the event the Florida Supreme Court – should, Your Honor, rule against the State, the State will appeal.

We believe that we have a right to have a fully developed record on the ineffectiveness claim which would necessarily go beyond the simple question of did he consent or didn't he consent because subsequent to the Florida Supreme Court's decision the Supreme Court of Washington in an en banc decision – the cite is 16 Pacific Third, page 1. And the case is, In the Matter of Stinson. That's [395] how they style it.

The court in an en banc decision which was identical to this case – in fact, in Stinson the defendant was protesting the defendant's strategy. The court rejected the claim on the basis of Strickland versus Washington.

Now, where I am getting, Your Honor, is the Florida Supreme Court has decided a federal question in a fashion contrary to the decision of that same federal question by another State Supreme Court.

The Florida Supreme Court didn't have the benefit of that. We fully intend to pursue this all the way again to determine whether we get a hearing on our issue. So we would expect since we've never had the hearing that the State sought – not in '88, not '92, we've never been able to get an examination of all the facts and circumstances which, of course, the United States Supreme Court would want developed as a position counsel took.

And, incidentally, I'm going to provide the Court with a copy of the reply to the petition for cert filed by Mr. Lang so that the Court has a full record. And we would, therefore, expect latitude on the competency of counsel particularly with respect to our examination of Mr. Corin. And that's our [396] position, Your Honor.

THE COURT: All right. Let me ask you this, Mr. Marky. What issues other than the one issue that has been framed by the Supreme Court would the State propose then to seek to create a record for?

MR. MARKY: Just what Mr. Corin did during the representation of Mr. Nixon, his trial preparation, discussions he had with him, we're not going off into the other issues –

THE COURT: Okay.

MR. MARKY: – other than competency of counsel as it might relate to his statement in court. And let me just say offhand, Mr. Corin did not plead him guilty. Mr. Corin in opening statement said he believed the State would be able to prove beyond a reasonable doubt the charge. But we want that

reviewed in a record properly developed so we can preserve our legal issue.

THE COURT: All right. If I could then – Mr. Freedman, hang on one second because what I want to do – I want to give you, obviously, a chance to make opening statements about this. I just want to make sure we have properly framed the issue before we start.

Now, Mr. Marky, I had on my own fully intended [397] to try to create as complete a record as possible and assuming that the issues would be fully developed in regard to Mr. Corin's representation of Mr. Nixon, conversations that occurred in regard to that representation, and development of the trial strategy which, certainly, is the pivotal issue. And then, of course, Mr. Nixon's statements also in regard to Mr. Corin pursuing that strategy or any other form of communication that occurred regarding the trial strategy.

What I was concerned about though is there were numerous other issues that Judge Smith addressed for example, competency – Mr. Nixon's competency to proceed. And it, certainly, appears that Judge Smith presented the legal arguments in regard to those particular issues, and I just did not or was not able to glean from the Supreme Court's opinion exactly how they were disposing of those.

But I did not intend to go into and I don't imagine that you-all intended to go into issues of the competency, the new evidence, those things that were raised at least in the motions but nonetheless to fully explore the issue of ineffective assistance of counsel in whatever form.

And I'm perfectly willing to allow the hearing [398] to proceed on those terms because my understanding is that although the issue is pretty much narrowed by the Supreme Court's opinion, I think in terms of developing a record it would

be appropriate to inquire maybe a little beyond the bounds of that specific issue of agreement. Now, Mr. Freedman?

MR. FREEDMAN: Your Honor, we, of course, agree that those claims on other subjects entirely aren't before you. But, furthermore, it's been remanded for one very narrow factual question relating to our claim on the Cronic case which holds that under certain circumstances you have no lawyer at all and need not meet a bunch of other requirements. And the Supreme Court said that if we managed to show no affirmative consent we have come within that case and are entitled to reversal without more.

Now, we, who also have in that 3.850 motion a Strickland claim which requires under Supreme Court law proving a bunch of additional things, have demanded and been denied a hearing on that. Counsel now proposes to get around the ruling of the Supreme Court that we win on Cronic and are entitled to a remand to see if we can prevail on that, holding all other issues in abeyance, and proposes to make a, quote, full record on, quote, competency of counsel.

[399] Then he's proposing to evade what the Supreme Court ruled, and then at some later time to be able to say, well, Mr. Nixon had a full chance to litigate everything about competency of counsel, and that's all wrong.

If we were going to have a full hearing about competency of counsel, which after all we are attacking, then we would put on evidence in support of all the claims in that petition. But that is nowhere where we are.

The petition as a whole is in the Supreme Court. Only this little piece about did he affirmatively consent is here. And of course matters that, you know, relate to that are appropriate; but any suggestion that this is an inquiry into competency of counsel generally we object to vigorously.

THE COURT: All right. Hang on, Mr. Marky. Tell me what ineffectiveness claims you decline to address or you would argue should not be addressed.

MR. LANG: Your Honor, as Mr. Freedman said, there are ineffective claims under Cronic which are, basically, per se ineffective assistance claims. There are guilt phase ineffective assistance claims under Strickland which would, of course, require the [400] two-prong showing of inadequacy and prejudice.

Those are definitely not part of this proceeding, and our concern is that what the State is trying to do is to try to overrule the Florida Supreme Court's decision. They said that the Cronic issue for them right now is the dispositive issue. I mean, they said it three times.

And then we also have Strickland penalty phase claims, inadequate investigation, failure to put on the proper witnesses, inadequate preparation of the expert witnesses, which also, of course, under Strickland would require both a showing of inadequacy and prejudice.

Now, if we are going to have a hearing on that, Your Honor first of all we ought to have had notice of that. And second of all, one day would never do it. If we knew that that was the case, we would have asked Your Honor for much more time. This is a total surprise to use that the State wants to inquire into this stuff.

MR. MARKY: Your Honor, perhaps I should complete the record. This is our petition in the United States Supreme Court wherein if you will look at the issue presented, we clearly tendered to the United States Supreme Court whether Cronic applied or [401] whether Strickland applied.

Now, I understand the Supreme Court answered that, and you're bound by it. But the United States Supreme Court is not. Now, we took the position in the United States Supreme Court that a hearing wasn't necessary to resolve that legal issue.

They filed the response I gave you and said it is premature, all he ordered was a hearing. It is disingenuous for counsel to say, well, gee, they need an evidentiary hearing on the issue. And then when we try to develop the facts which the Supreme Court of Washington looked to, they say, oh, well, you can't develop that.

We only have got one question. Your Honor, it will only take five minutes to answer the question supposedly that they want to limit you to. And I submit the State will be denied its legal right to develop a correct record.

MR. FREEDMAN: With respect, Your Honor, there is no inconsistency. And if anybody is going to be denied their legal right if you proceed according to their plan, it will be our denial of a legal right to develop a full evidentiary hearing on our Strickland claim.

No, Your Honor, we said, quite appropriately, [402] that to figure out whether Cronic applied or Strickland applied was all premature at this point because the facts with respect to whether or not there was any affirmative consent had not been developed.

If it turns out there was affirmative consent, the whole case is moot anyway. If it turns out that there wasn't any, then he can take his cert issue, and it will follow as it follows. But that was the factual issue to be determined.

And exactly what we wrote in the cert petition was the Florida Supreme Court has sent it down to decide whether there

was affirmative consent. You, the United States Supreme Court, shouldn't mess with this until that time.

And that was our position then, and that's our position now. And that's what the hearing is about as far as we are concerned. And as Mr. Lang said, we feel strongly that it would be plain error to expand it beyond the particular bounds of what's been remanded.

And if, indeed, it will take five minutes to decide that, that's great. We will be out of here in five minutes.

THE COURT: Well, what I am going to do at this [403] point, gentlemen, is to begin with the issue specifically articulated by the Florida Supreme Court. And as soon as we have pretty much covered that issue, then, Mr. Marky, we will proceed to see what exactly it is that the State would like to include in the record or to elaborate which issues because what I would like to do is try to confine this to the motion as it was filed by the defendant and to proceed from there because we're talking rather generally about ineffective assistance claims.

And, obviously, you understand, Counsel, that my concern is that this case has been piecemealed so many times. And the Supreme Court appeared – Florida Supreme Court appeared to express great frustration over the length of time that it took to get here.

I am more than willing to provide as much time as is necessary to develop whatever issues need to be developed. But what you seem to be telling me is we are going to do this one, which has taken considerable effort to get to, one very small issue; and then we are going to start doing the other issues.

Now, I don't know because I, unfortunately, just [404] cannot tell from the Supreme Court's opinion if they intended to agree with Judge Smith that the denial without a hearing was

appropriate in regard to those other claims. I just can't tell. And the habeas corpus they have certainly put to the side at least temporarily.

MR. FREEDMAN: Your Honor, this is a case, I'm afraid, of make haste slowly. What we are sparring about in the big picture is federal habeas corpus. What's predictably going to happen if you accede to their proposal is that when in federal habeas corpus we want to press the Strickland claims, assuming that they are eventually denied by the Florida Supreme Court – it is our view, considering the first footnote in that opinion, that they have held everything except the Cronic claim.

But assuming that our Strickland claims are eventually denied by the Florida Supreme Court, when we reassert them in federal habeas corpus, it's a certainty that the State will respond, ah-ha, you had the opportunity to develop those in an evidentiary hearing in Florida State Court, and you didn't. And now you're foreclosed from developing them.

Therefore, if you intend to get into Strickland, we are going to have to respectfully insist exactly [405] on what Mr. Lang said which is then we want the right to put on our Strickland case and/or – or have you deny us that right so we can tell the Federal Court there is no mystery about it, so we can tell the Federal Court that we did not have the opportunity to present our Strickland case.

What we don't want is for the State both to be able to evade what the Florida Supreme Court said, which is we don't need to talk about Strickland, we are only talking about Cronic – if we get this fact issue resolved, the whole case may go away on Cronic – and also to get the benefits of saying, well, there is a full hearing on everything, why didn't you put on your case under circumstances where, of course, we didn't have the slightest notice to do any such thing.

MR. MARKY: One more. Your Honor, I am not talking about whether you would consider it ineffective in his failure to present a competency defense or anything like that. I am talking about, develop what Mr. Corin did leading up to the decision that he came to to [sic] not litigate the guilt issue and the facts and circumstances surrounding that decision.

Because, otherwise, I am going to get up there, [406] and I'm not going to have any evidence to present that the issue was to be decided under a Strickland prejudice test rather than Cronic.

THE COURT: Certainly.

MR. MARKY: And I'm not asking you to overrule the Supreme Court. And I believe the Court fully well knows I wouldn't do that. But we would have a right to –

THE COURT: I'm not sure about that, Mr. Marky.

MR. FREEDMAN: With all respect, that is what he is trying to do. That is exactly what they ruled.

THE COURT: Well, no, let me –

MR. MARKY: Excuse me?

THE COURT: Hang on, Mr. Marky. What I am – and perhaps we are making a little mountain out of a mole hill here. What I am hearing from Mr. Marky is perhaps some latitude in development of the record on this claim as I've articulated.

And I, certainly, will provide the State with that opportunity. I want to fully provide – or to provide a full record and as complete as possible in regard to everything having to do with development of the trial strategy and the discussions that occurred there between Mr. Corin and Mr. Nixon.

MR. MARKY: May I just add one thing?

[407] THE COURT: All right.

MR. MARKY: Of course, counsel perhaps overlooked we have a right to proffer evidence –

THE COURT: Sure.

MR. MARKY: – that the Court wishes to exclude.

THE COURT: Okay.

MR. MARKY: And I'm not trying to do what they are suggesting I am.

THE COURT: Well, I think we are now having a meeting of the minds. Because, certainly, Mr. Marky, if, for example, on the issue of competence or whether trial counsel understood that Mr. Nixon was not competent when the trial – whatever.

I doubt that Mr. Lang and Mr. Freedman are prepared with whatever witnesses they might need for that. But in this general issue, in the complete issue of trial counsel's preparation and strategy, I have no inclination at all to limit the testimony one way or the other.

So, I mean, in other words within obvious reasonable bounds I certainly intend to develop a full record there. So I think we are all in agreement at this point, and I think we are safe to proceed.

MR. FREEDMAN: Your Honor, if we could, before [408] we lose it, we also have these couple of preliminary matters.

THE COURT: Okay.

MR. LANG: Looking around the courtroom are we sure that basically it is just court staff in here? Otherwise, we would approach the Bench.

MR. EVANS: Well, we have a lot of people from our office, the Public Defender's Office, and the reporter who was here has left.

THE COURT: Are we looking for witnesses, Mr. Lang?

MR. FREEDMAN: If the reporter is walking in and out of the room –

MR. EVANS: The reporter is not in here.

MR. FREEDMAN: Well, I don't know if he will suddenly walk in in five minutes.

MR. LANG: Maybe we should approach the Bench. This is going to be short.

THE COURT: Well, gentlemen, I am a little reluctant to –

MR. FREEDMAN: We can bring the court reporter, and we can bring the defendant.

MR. EVANS: Well, Judge – just give an overview of what you want to discuss with her.

MR. LANG: We can address it quickly. First of [409] all, since Mr. Freedman here has been making legal argument, we would like to present you with an order admitting him pro hac vice so that if he does anything bad, at least he is under your jurisdiction.

MR. MARKY: No objection.

THE COURT: Thank you. We should attend to these housekeeping matters.

MR. LANG: But then we have two substantive issues, Your Honor, that we want the Court to be aware of. The first is, obviously, Your Honor is aware that documents from the attorney's file have been produced here. But they are produced under seal.

We have a stipulation with the State cooperating with us that they will be limited only to use by Mr. Marky, Mr. Evans, and the immediate staff that are using it. And they will go back to the court file under seal.

We would like the Court and the State to be mindful when referring to attorney/client documents that they not be – that they be shown to the witnesses, but that they not be –

MR. MARKY: Your Honor.

MR. LANG: – published, if you will, to the outside world because if the ultimate result of this [410] turns out to be a new trial that, obviously, could have devastating constitutional consequences.

MR. MARKY: Your Honor, if I might be heard on that. Counsel is concerned about media. While Florida has come in the sunshine and we don't have hearings where evidence is not presented and, the way things look, any retrial will be many years away should one ever be held, there has been a waiver of the attorney/client privilege by the invocation of an ineffective assistance of counsel claim. And there is no basis for this motion.

We oppose to it without – and if the Court please, it would have to submit notice to the media and give the media an opportunity to be heard.

THE COURT: Well, let me do this, gentlemen. Now, Mr. Lang, my concern when I issued the order was that if the defense wished to have that order reviewed, my understanding of the Supreme Court's position on this is that they will entertain a certiorari petition to do so.

And that was why I inquired and gave you an opportunity to seek review if you had decided that was appropriate. I mean, I greatly appreciate the fact that we are able to proceed here with the hearing and that review was not sought because I [411] fully expected that it would delay the hearing.

MR. LANG: Well, Your Honor, I guess – I'm sorry.

THE COURT: Let me do this. If there are specific matters that the defense feels are highly – I won't use the term prejudicial. If you are expressing some serious concern over a particular statement contained in those documents, we may have a Bench conference regarding that.

But my feeling is because I have disclosed those records to the prosecution at this point and in light of the Supreme Court's position on the attorney/client privilege – and I know the defense certainly took a slightly different view of those records. And I, of course, ruled accordingly.

But I believe they should be discussed to the extent that they need to be discussed. And I don't know if the State needs to discuss them or you need to discuss them. But I don't see any way to prevent that from being publicly disclosed.

And I understand the legal difficulty that may place you in in [sic] terms of any further argument about them. But I just

encourage you to place any objections you need to on the record or any further discussions about those records as we need to go [412] along.

But generally, I would deny your request to keep those matters private because I do believe they have been disclosed at this point. And, again, there is a huge body of documentation, a large number of records that were revealed that I have agreed to seal into the Court file because there may be none used here today in which case it would be, obviously, the best practice so that the Supreme Court can review that.

I don't know what documents you-all may need from that large number of records that were at issue. So let's see where we are with that because there may be no records of great relevance. In regard to my concerns about Mr. Corin's handwriting, there may not have been much that was of any great revelation in those records.

Let's wait until we get to those points, but generally I want the record to be clear that my understanding would be that by making them available to the State we can't then prohibit public disclosure of those records unless there is some overriding need to. And I would be willing to address that at the appropriate time.

MR. LANG: Well, Your Honor, I guess it falls in the category of our disinclination to appeal so that [413] we can move this along may fall in the category of no good deed goes unpunished.

But our understanding was that they were going to be disclosed to the State, that they certainly weren't going to be, you know, tacked up on the bulletin board downstairs and limited to these gentlemen here. And perhaps you're right. Perh_ps it won't become an issue.

But we did point out in our brief when we moved for a protective order that there is a very strong and long line of cases from the United States Supreme Court that says that you can't trade one right for another.

And, yes, obviously, the State is entitled to this material. We gave them a lot of it, and then you gave them more. And we are not squawking about that. But at some point we feel that the constitutional line might become overstepped. And I suppose we will have to carefully watch and see how that goes in the hearing.

MR. FREEDMAN: The practical way of dealing with this, Your Honor, might be simply that they and we not offer them into evidence where they become part of the Court record, for the benefit of the Supreme [414] Court and any review of the Court, sealed. And so as long as – he can ask any questions he likes. And as long as he doesn't then proceed to offer them, that will be a practical accommodation that I think might meet everyone's interests.

THE COURT: Go ahead, Mr. Marky.

MR. MARKY: If you would look at the deposition of Mr. Corin, he couldn't testify to anything unless he was looking at his record. That was his whole position for two hours.

Now for us to try to present a case under those circumstances and not use the records would be – plus, Your Honor, let the record be clear, confidential attorney/client privilege once it is waived, it is waived for all purposes.

And the case law is clear, and the Florida Supreme Court upheld it. Now, I submit to you they want you to overrule the Supreme Court.

MR. FREEDMAN: Your Honor, we have no problem with him handing –

THE COURT: Right.

MR. FREEDMAN: And, of course, we disagree about waiver. We will argue that one out in our motion to bar the new trial on constitutional grounds if necessary.

[415] THE COURT: All right. What I anticipate, Mr. Freedman, just so you understand. I don't think it is going to make a lot of sense – and it may make sense in some context. In other words, if Mr. Corin is refreshing his recollection with his records or referring to other parts of the file, I certainly can't see any way we can develop an appropriate record here without reference to what it is we are talking about.

So in other words, I think we will have to generally deal with those issues. I don't want this to completely grind the hearing to a halt. But as I said, if there is an extraordinary issue that you want me to consider – because as I indicated in my motion, regrettably I could not read many of the documents because they are handwritten.

And my feeling was that from what I could read there was no evidence of other crimes, which I was very carefully looking for in order to protect based on my understanding of the case. I did not see that.

Now, if you-all have identified something like that that I need to address before it is exposed, please let me know. That's what I am talking about, Mr. Marky, just any particular issue that would have [416] been subject to disclosure but not as I would have intended because I simply could not read the documents.

So that's the kind of thing I am looking for; and I think you, certainly, have preserved your record, Mr. Lang and Mr. Freedman.

MR. LANG: Now, Your Honor, we do have one more issue. If you like that one, you are going to love this one.

THE COURT: Okay.

MR. LANG: We are in a bit of a paradoxical situation here in the sense that the State has put Mr. Nixon on their witness list. And, obviously, examination of Mr. Nixon is going to involve things that are definitely germane here, but at the same time the right not to incriminate oneself may come into play.

And, therefore, I think we have to be very careful in following that line of questioning, whatever line of questioning the State tends to pursue, that we are attune to the fact that it would be improper. And I guess this is in the nature – they only put Mr. Nixon on the list yesterday.

It's in the nature, I guess, of a motion in limine. I think we have to be very careful to [417] distinguish between asking Mr. Nixon questions about what he said to Mr. Corin and vice versa and asking him questions about the underlying crime.

And, for example, to put the point bluntly, whether he did it or he didn't do it or did he do this or did he do that? Because, obviously, that would implicate adversely his Fifth Amendment rights. And so I think we need to – I guess what I am saying is that we would find any questions along those lines to be objectionable.

THE COURT: Mr. Evans?

MR. EVANS: I have prepared a memo on that particular issue. By filing his motion Mr. Nixon has already testified. He is the one who swore to the facts in the motion. So he has waived his Fifth Amendment rights in this hearing because he has already put sworn testimony before the Court that the Court

has considered in light of the fact that we are here for a hearing today.

Therefore, if he invokes his Fifth Amendment right privilege, under the Florida law as cited in that memoranda this petition should be dismissed with prejudice; and this ball game is over with.

THE COURT: Well, it is my understanding, Mr. Lang, that you anticipate that Mr. Nixon would [418] take his – or invoke the Fifth Amendment privilege in regard to his entire testimony?

MR. LANG: No, not at all, Your Honor.

THE COURT: Or are you talking about perhaps evidence of other crimes that we've just discussed or something to that effect?

MR. LANG: Not at all. The privilege in our view – and I've just been handed this. There is no way that I can respond to it standing up here. The privilege would only be invoked with respect to whether or not he actually did the crime, not with respect to whether or not he had a particular conversation with Mr. Corin, whether or not – or with law enforcement.

You know, for example, there is a confession. There is no secret about that. The State is perfectly entitled to ask Mr. Nixon whether or not that's his confession, whether or not he signed it. But they are not entitled to put him on the witness stand here, basically throw away his cloak of Fifth Amendment protection against self-incrimination, and say, okay, now tell us whether or not you did it.

MR. EVANS: Your Honor, at this stage I didn't put him on the witness stand. They put sworn testimony [419] before this Court by filing the motion. The Fifth Amendment privilege has

been waived. And once it is waived, it is waived as to all the issues once he takes the stand in regards to this case.

THE COURT: Let me ask you this though. Of what relevance would it be whether or not he committed the crime?

MR. EVANS: Your Honor, as we are developing the record when it goes toward the strategy, Mr. Corin had an opportunity to discuss openly and unincumbered by any Fifth Amendment privilege as to what Mr. Nixon's version of events were. And based upon the stories he was told by Mr. Nixon, he had to develop a strategy.

And he had to discuss that strategy if it was in conflict in any way with Mr. Nixon as to what the final strategy to put forth at trial was going to be. And because of that, we need to know what Mr. Corin knew, what he discussed with the defendant in order to get to the ultimate strategy that was put forth in the case and whether or not Mr. Nixon consented to it.

We need to know the mental states of both Mr. Corin and the defendant in accepting this defense that was ultimately put forth at trial. So it is [420] necessary to know what Mr. Corin knew from Mr. Nixon, what Mr. Nixon told Mr. Corin, or what they remember telling or not telling each other. And at this stage he had already testified by virtue of his motion. So privilege is waived.

MR. FREEDMAN: Your Honor, we have no objection to anything counsel described, none of which answers your question.

THE COURT: Well, of course, I think what Mr. Evans is alluding to is he does intend to ask that question. I just don't know – I am not terribly convinced that whether Mr. Nixon committed the crime or not is relevant.

What he said in that regard – now, perhaps some general conversations certainly that were held between Mr. Nixon and Mr. Corin about his involvement in the offense would be very relevant.

MR. EVANS: One of the things, Your Honor, is if Mr. Nixon told Mr. Corin that he committed the crime, then Mr. Corin was then put in an ethical dilemma of the situation. He could not knowingly put on perjured testimony.

And if Mr. Nixon confessed to it, then he couldn't put Mr. Nixon on. If Mr. Nixon told him he did it, then he could not put on other witnesses who [421] would say Mr. Nixon's didn't do it. Or he couldn't put on evidence that would tend to show maybe somebody else did it because Mr. Nixon had already told him that.

So those avenues of defenses would have been blocked by Mr. Nixon's comments to Mr. Corin.

THE COURT: All right. Let's get to that point. All right. In other words, if Mr. Nixon is called as a witness by the State or if there is some cross-examination that is going to get into this area, then interpose the appropriate objection; and we will deal with it at that point in time.

I think knowing what the question is is going to be very important in where we are headed with it. So I will reserve ruling on the motion in limine until we actually reach the appropriate point in the proceedings.

MR. EVANS: And there were two preliminary matters I want to make sure we did. The information that was supplied from the Public Defender's Office pursuant to subpoena duces tecum and the Court's protective order, our understanding is that is part of the record that will be submitted to the appellate courts and something they can consider.

THE COURT: The protective order?

[422] MR. EVANS: No, the box of information that was filed under seal with the clerk's office that contained all the records.

MR. LANG: Yes, of course.

MR. EVANS: Okay. And the other thing is I have the original copies of the depositions that were taken. They have yet to be filed with the Court, and we would ask that they be also made part of the record. These are the depositions.

MR. LANG: There's no objection.

THE COURT: All right. And I'd appreciate if you'd hand them to me, Mr. Evans, because then I will have my own copy. Thank you.

MR. FREEDMAN: Are you ready for the first witness, Your Honor?

THE COURT: In just one second. Gentlemen, also I need to speak with our staff attorney for a second. The television folks want to come in. And, of course, we, obviously, have a policy in Florida of permitting that.

They should have been here earlier, and I probably should exclude them because I don't want to disrupt the proceedings. However, I will let them come in because I do need to take just a moment to speak with our staff attorney. So if they want to [423] come in now, if they can, do it real quick.

(Court is in recess.)

THE COURT: Gentlemen, are there any other preliminary issues to address?

MR. LANG: No, we are just waiting for Mr. Corin. We understand he will be here in a minute.

THE COURT: We will proceed with Mr. Nixon's case. Mr. Lang?

MR. LANG: Your Honor, my opening statement is going to be very brief. The Florida Supreme Court in our opinion has given us a very clear directive here.

The issue to determine in this evidentiary hearing is whether there was an affirmative and exclusive acceptance of Mr. Nixon's trial counsel's strategy to concede his guilt.

And the Court made clear, silent acquiescence is not enough. That being framed as the issue, we are prepared to call the trial attorney Mr. Corin to the witness stand.

THE COURT: Mr. Corin.

Whereupon,

MIKE CORIN

was called as a witness, having been first duly sworn, was [424] examined and testified as follows:

DIRECT EXAMINATION

BY MR. LANG:

Q. State your name.

A. Mike Corin.

Q. What is your current occupation, Mr. Corin?

A. Assistant public defender.

Q. And that's in Leon County?

A. Yes, sir.

Q. And what was your position in 1984 and 1985?

A. Assistant public defender, Leon County.

Q. And in that capacity did you represent Joe Elton Nixon in a murder trial?

A. Yes, sir, I did.

Q. Do you recall exactly when you began representing him?

A. In August, I think, of '84.

Q. Mr. Corin, in the course of your representing clients, do you have a practice of keeping notes of your meetings with them?

A. I do keep notes.

Q. Could you just briefly describe that?

A. Well, I take notes and stick them in the file of [425] every case I've ever had.

Q. And did you adhere to that practice in Mr. Nixon's case?

A. Yes, sir, I did.

Q. And did you produce those notes to the State Attorney?

A. Well, I answered an order of the Court, and they released them to the State.

Q. And did you have an opportunity yourself to review those notes recently?

A. Well, yes, sir.

Q. Now, going back to your time representing Mr. Nixon at trial, did there come a time when you formulated a strategy for trying this case?

A. Yes, sir.

Q. Could you briefly describe what that was?

A. Well, it was not to put on a defense. The strategy was to attempt to save his life.

Q. How did you intend to do that?

A. By trying to show that even though the State may have been able to prove the acts for which he was accused, there were good reasons he shouldn't be sentenced to death.

Q. So as a consequence of your opening statement, you conceded his guilt?

[426]A. Well, I think I probably indicated that the State was probably going to be able to prove the case.

Q. Now, did you explain that strategy to Mr. Nixon?

A. Yes, sir.

Q. And did he affirmatively consent to that strategy?

A. My best recollection would be consistent with, I think, the testimony I gave in a hearing in 1988. And there is a transcript of that hearing. And if he – he didn't sign a waiver. He didn't sign an acknowledgment, and my best recollection is he did nothing.

Q. Did he affirmatively consent?

A. Did he say, yes, sir, go for it, that's the way I want you to do the case? No, sir, he did not.

THE COURT: I'm sorry. Mr. Corin, what was your answer?

THE WITNESS: Did he affirmatively say, yes, that's what I want you to do, go for it? He did not do that.

BY MR. LANG:

Q. Now, do you recall after you made your opening statement whether there was any reaction by Mr. Nixon to the opening statement?

A. Well, from the brief review of my notes, it appears that may have been the following morning before [427] the commencement of court. I believe I met with him in a holding cell.

Mr. Marky is pointing at me I think. Can you hear me, or do you just want to point at me or something?

I believe I met with him in the holding cell. And he had seen a copy of the newspaper, and he was not pleased. And I believe the headline in the paper or the story in the paper was what I had done in the opening statement.

Q. Now, you testified before that you had previously testified in this matter back in 1988; is that correct?

A. I believe it was December of 1988.

Q. Right. December 19 of 1988 if that helps refresh your recollection. And have you had an opportunity to reread that testimony?

A. I've read that testimony.

Q. And is it correct that you just testified that that testimony also remains true and correct as of today?

A. To the best of my knowledge that was probably a more accurate statement of what occurred than anything I would recall today. I mean, it has been many, many years and many, many cases since then.

MR. LANG: That's all. No further questions.

THE COURT: Thank you, Mr. Lang.

[428] MR. FREEDMAN: Your Honor, we are not going to offer the transcript referred to since it is in the record, but we would be happy to provide you a copy for your convenience if you would like.

THE COURT: Thank you. I would appreciate that.

MR. EVANS: Is that the copy of the –

MR. FREEDMAN: December 19th hearing before Judge Hall.

THE COURT: And I think Mr. Freedman's understanding is this has already been made a part of the record,

but I don't have a copy of it right now. So he has just provided it to me.

MR. EVANS: It was referred to, I believe, in Judge Smith's rulings.

THE COURT: Right. Thank you. Mr. Evans?

CROSS-EXAMINATION

BY MR. EVANS:

Q. Mr. Corin, what was your experience as a criminal defense attorney in 1985?

A. My experience?

Q. Yes.

A. I started working in the State Public Defender's Office in 1976; and I stayed there until, I think, late '78 when I went with the Federal Defender's Office. And then I came back 18 months later, and I have been an [429] assistant public defender straight until this time.

Q. And what type of cases were you handling with the Public Defender's Office and the Federal Public Defender's Office?

A. During that period of time I handled every kind of case you can have.

Q. Misdemeanors?

A. Misdemeanors and parole violations, probation violations, felonies.

Q. All degrees of felonies?

A. Yes, sir.

Q. And what was your experience with death cases in 1985?

A. You mean in the trial of them or in appellate experience or –

Q. Both appellate and trial experience.

A. Well, I had worked in the Attorney General's Office for about four and a half years before I became – went out in private practice briefly and then went with the State Public Defender's Office. And I had worked on capital cases there for the State. And then I did capital appeals in the Public Defender's Office from, I think, when I got back there in 1980 until '81 – or '79 until '81. It was about an 18-month period of time.

Q. During your time as an appellate attorney [430] handling capital cases or appeals on capital cases, did you have an opportunity to review the records and see the type of strategies that other counsel had used in death cases?

A. I mean, writing a brief I reviewed transcripts, yes, sir.

Q. And what kind of trial experience did you have in capital cases in 1985?

A. I'm not sure exactly the extent of my experience – participation at that time. I mean, I know Gene Taylor and I handled a case here in town. I don't think I had any – I remember the Clifford Walker case, and then I probably had some other murder cases that may or may not have gone to trial.

But, I mean, I'm sorry, sir, but, you know, in all the years I have been a lawyer I represent a thousand clients a year on average. And I don't keep a track record if you know what I mean.

Q. Are cases in which the death penalty is sought by the State of Florida significant cases in your mind?

A. Sure.

Q. And do you think you would have some particular recollection of a capital case should you have handled it?

A. If you say a capital case did I have any clients sentenced to death other than Mr. Nixon prior to 1985, I [431] believe I didn't.

Q. Had you had any other cases that had went through a trial and –

A. Clifford Walker is the one that comes to mind.

Q. And so there had been one. And Mr. Walker was not sentenced to death; is that correct?

A. You are correct, sir.

Q. So this to your recollection would have been the second case you would have had that would have been tried through trial up to a penalty phase?

A. Probably.

Q. And that would be a rather significant case in your mind? It's the only case you've tried in your career that the

defendant wound up on death row. So my question is, is that a case that you think you would have some remembrance of?

A. I don't think that was your first question.

Q. Well –

A. If you ask me, is it a significant case? Yes, sir, it was very significant.

Q. Is it significant to you?

A. Have I thought about the case?

Q. Yes, sir.

A. I try not to, sir.

Q. You say you try not to. Does that mean you [432] still – even though you try not to you still think about the case every now and then?

A. Well, people keep bringing it up, sir.

Q. And did you know at the time that the trial strategy that you were going to use was going to be questioned at a later time should the defendant receive the death penalty or should he receive a life sentence?

A. I anticipated that people probably would be talking about it.

Q. Did you anticipate that the appellate courts would look over it?

A. Oh, I anticipate the appellate courts will look over every death case.

Q. Now, with that in mind, did you keep any detailed notes because –

A. No, sir. My notes were the same in his case as they would have been in other cases to my recollection. I mean, you can pull my files if you had the ability to and the notes would be just as – about the same as that depending upon the life of the litigation.

Q Now, you have said or indicated through your previous testimony that your memory had somewhat eroded about this case since 1985 whenever it was tried, that you can't recall some things that you may have recalled earlier?

[433]A. Well, that's probably true. I mean, I can't recall everything. I mean, you know, I got married in 1966. I remember where it was. If you asked me who was there – it was probably the most significant thing in my life, but I couldn't exactly tell you everybody who was there.

Q. You knowing that the case was going to be looked at at the time you tried it in 1985, knowing that there was – and then the hearing in 1988 and, I believe, another one in 1989 at which you testified –

A. That may be true. You're obviously more familiar with the case at this point in your life than I am at this point in my life.

Q. And then knowing that eventually even at the time the Supremes decided the case – and I believe in the 1990s that there would be an evidentiary hearing or there could be an evidentiary hearing at some point if the defendant filed a post-conviction motion, you didn't feel it incumbent upon yourself to record any of your recollections for the benefit of Mr. Nixon or for the benefit of the State?

A. Absolutely not. I felt no obligation to do anything other than appear pursuant to the subpoena. I did the best I could.

Q. Now, this case was not the first time you [434] represented Mr. Nixon, was it?

A. No, sir.

Q. When did you to your recollection first begin to represent Mr. Nixon?

A. Probably 1983, but I'm not sure.

Q. Do you remember what type of cases that you would have represented him on before this case?

A. As I recall – and, again, I don't know whether our office even has the files anymore. And I don't think they appear in CJIS, at least maybe one of them. There had been, I think, a robbery case and then an attempted burglary case.

Q. Now, during that time in those trials did you put forth a defense? Did you not contest the guilt of the defendant, or did you contest the guilt of the defendant in your strategy?

A. I believe if I'm not correct – and you might call Mr. Hankinson. He may have some recollection of this. There was a robbery case that was dropped by the State during – or during jury selection because as I recollect the victim – the alleged victim in that case had misidentified Mr. Nixon and confused him with a younger brother who she then identified as the perpetrator.

And the burglary case, you know, it is just [435] vague. I think it was an attempted burglary, and I don't remember exactly what the defense was or was not in that case. I believe that's the

case that was pending sentencing at the time of the situation that you're discussing today.

Q. Now, during the times of the robbery case since it got all the way up to jury selection and during the times of the attempted burglary case, did you have an opportunity to discuss trial strategy in those cases with Mr. Nixon?

A. I'm sure I did.

Q. And did you have a good rapport with him?

A. Yeah, I mean, I assume. You know, representing the accused in criminal cases, you know, your perception of what is good rapport may be different than theirs.

Q. I'm not asking for Mr. Nixon's perception. I am asking for your perception.

A. Do I recall that he complained about my representation at any point in time? Is that your question?

Q. No. I'm asking, did you consider that you had a good rapport in communicating with your client as to trial strategy in those other cases?

A. I don't know whether I considered it or not.

Q. Can you explain that answer?

[436]A. Do I independently recall him complaining about anything I was doing in those cases, no, I do not.

Q. Do you recall whether or not the time – your conversations you were having with Mr. Nixon about the trial strategy in those cases was a two-way street?

A. I don't independently recall any conversation I had with Mr. Nixon at that time.

Q. Do you recall if Mr. Nixon did the same thing you have just testified to that he did in this murder case was nothing?

A. I do not independently recall that at all, sir. one way or the other.

Q. Do you have any recollection of how the relationship with Mr. Nixon was during the time of those trials?

A. I think I had – my perception was that we got along fine. But, you know, my perception may be wrong.

Q. Now, Mr. Nixon had the ability to understand the proceedings that were taking place on the previous occasions during the robbery and the attempted burglary?

A. Yes, sir, I believe he did.

Q. How soon after the defendant was arrested did you get involved in representing him?

A. I think it was probably the night of the arrest, fairly shortly after he was arrested.

[437]Q. And would you have filed a written plea of not guilty in that case?

A. I may have. I mean, I assume I did. Sometimes I do them orally. Sometimes I do them in writing.

Q. Did Mr. Nixon direct you to file that written plea of not guilty, or did you file it as a matter of court of your representation?

A. Probably did it as a matter of course.

Q. Now, did you have an investigator assigned to you during that time period?

A. Probably – I mean, now that you have subpoenaed Tommy Moore, I assume Tommy was involved. I can't recall if anybody else was.

Q. But during that time period would Mr. Moore have been assigned to you only on this case, or would he have been an investigator assigned to you to help you on all your cases should you need him?

A. I have no recollection whether he was working on this case alone or other cases or whether he worked for me or several other lawyers in the office. The tradition is we have one investigator working for several lawyers. The tradition changes because we have different lawyers.

Q. How much time were you able to devote to the murder case?

A. I have no idea how many hours I spent working on [438] it, thinking about it. I did have a case load of other cases at the time.

Q. Now, how many pages of notes did you keep?

A. You have a copy of them. I mean, I got a copy here. If you want me to pull them out and count them, I will be happy to do it; but I don't independently recall how many pages of notes there were. I mean, there are copies in the file.

Q. If you don't mind pulling it out, I believe there is a number that has been placed on there by Mr. Lang's firm. And I believe it is maybe 56 pages of personal handwritten notes?

A. If that is what it says, that is what it is. You are talking about the interview notes in the Document Identification Number 1?

Q. Yes.

A. That appears at the top to have 59. I didn't write that. So I'm assuming the counting is correct, sir.

Q. Did you also have a fairly large number of pretrial and jury selection notes?

A. Yes, sir. Somebody has given me copies of the – we have the interview notes, and we have trial notes which I see Document ID Number 3 looks like some trial notes which may include other people.

And my notation on this one looks like at least [439] 70-some pages of notes. And then maybe there is another one here. These are more trial and deposition notes and things like that. I'm not sure how many pages there are. I don't think anybody has written at the top of those how many there are, you know, one through whatever.

Q. Does that stack appear to be about the size as the one with 70 pages in it?

A. I guess. I mean, you can weigh them out if you want.

Q. Did you take depositions of material witnesses involved in this case?

A. Yes, sir, I believe I did. I believe you have copies of them.

Q. And did you have an opportunity to meet with your client?

A. Yes, sir.

Q. And do you recall how many times?

A. No, sir.

Q. Did you keep notations of the number of times in your handwritten notes?

A. Yes, sir, I believe – you know, I mean, I am assuming that every time I met with him I took them, but I can't swear to that. But normally I would have kept a note every time I spoke with Mr. Nixon or virtually anybody about the case.

[440]Q. So the number of times that you noted in your notes would be at least a fair estimation of the number of times you met with Mr. Nixon?

A. There may have been other times, but may not have been. But the times that are noted in there it would have been a fact that I was meeting with Mr. Nixon.

Q. Now, did you discuss with Mr. Nixon the things that may need to be investigated in this case beyond what evidence the State had already put forth?

A. Probably did. I mean, I discussed with him the state of the evidence.

Q. And would you have discussed with him possible defense witnesses?

A. Probably did.

Q. Now, at some point you indicated that your strategy would be to try to avoid the death penalty and not contest guilt; is that correct?

A. Yes, sir.

Q. Do you recall what point in the litigation that that occurred?

A. No, sir.

Q. Would it have been a decision you would have made lightly?

A. No, sir.

Q. Would it have been a decision you would have [441] made without discussing it with Mr. Nixon?

A. No, sir.

Q. Why did you make the decision to pursue that strategy?

A. In my professional opinion that was the best way to proceed with the case at that time.

Q. Why was it the best way to proceed with the case at that time?

A. I felt based upon the state of the evidence that that may be the only way to save the gentleman's life.

Q. What other strategies did you discuss with Mr. Nixon?

A. I don't know. I mean, what other strategy are you talking about, you know, defense of insanity or alibi or something? I mean, I suspect we at some point discussed whatever we needed to discuss.

Q. Well, there were a number of psychiatrists or psychologists who had taken a look at Mr. Nixon; is that correct?

A. Well, I don't know what a number is. I think there were two that I conferred with, maybe Mr. Eckwall and Mr. Norman as I recall from my review of the notes.

Q. Did Mr. Nixon have a history of mental illness or mental problems or disabilities?

A. I think he has, yes.

[442]Q. And did you look into those as possible defenses in this case?

A. Yes, sir.

Q. And it was elected not to go with those defenses?

A. Well, if you're talking about insanity, I think there was not an insanity defense. There were a lot of mitigating circumstances due to his mental abilities or lack thereof or things like that.

Q. So there was not an insanity defense that could be taken in this case. Were there any other possible defenses that could have been taken like I'm innocent, I didn't do it?

A. That may have been a possible defense.

Q. Why was it not pursued?

A. Well, that was not what occurred.

Q. And what do you mean that was not what occurred? Was there no evidence that you found or any witnesses you found to put forth that defense?

MR. FREEDMAN: Objection, Your Honor.

THE COURT: What grounds, Mr. Freedman?

MR. FREEDMAN: If the question is that was not what occurred referring to what happened at the time of the crime, then we object for the reasons previously noted.

[443] If the question is that was not what occurred referring to what he did at trial, of course we have no objection to that. I just want to make sure that counsel's isn't asking the question that we objected to having asked of Mr. Nixon.

THE COURT: Well, I will overrule your objection to this question. Go ahead, Mr. Evans.

MR. EVANS: Can the court reporter reread the question?

(Reporter read back last question.)

A. If – well, I am trying to phrase my answer to the best of my ability. If there was an indication that there were some other witnesses or some other person who may have done this act, then I assume that we explored it and it was unavailing.

BY MR. EVANS:

Q. And that would have included an alibi defense as well?

A. Yes, sir, I assume it would have.

Q. Did you consider the possibility of putting on a defense of a lesser included offense, that the defendant wasn't guilty of first-degree murder but guilty of second-degree murder?

A. I assume I had thought about that at one time.

Q. You assume –

[444]A. Mr. Marky wants to say something to you I think.

Q. You said you assume. Did you?

A. You know, Mr. Evans, I am trying to answer the best I can, but there are things that I don't recall. There are things that I – this is a long time ago. A lot of things have occurred since then. I have tried not to think about the case for a long period of time.

Q. Now, you were aware that a lesser included defense was available to first-degree murder?

A. Well, I am not stupid; and I know that sometimes juries will find people guilty of lesser offenses. If you are asking me in my professional opinion did I think they would find him guilty of a lesser included offense in this case and not first-degree murder, in my professional opinion I didn't believe that was the case. And I believe that was the State's position all along.

Q. My question went, that would have been an option you would have known about at the time and an option you would have waived, you would have considered and would have been eventually rejected?

A. If you are asking me, did I consider that he might be found guilty of a lesser offense? I probably did.

If you are asking me if I thought on the state [445] of the evidence he would be in my professional opinion found guilty of a lesser offense, I don't believe he would have been.

Q. And would you have communicated to Mr. Nixon that these other defenses that could be put forth were not reasonable defenses in his case?

A. Yes, sir, I'm sure I probably advised him and gave him the best legal advice I could at the time.

Q. If Mr. Nixon would have told you to pursue these defenses, would you have pursued them?

A. Well, probably to some extent, but at some point a decision has to be made that they are unavailing.

Q. Did you reach that point in this case?

A. Well, apparently I did based upon the way I tried the case. Where that point reached, the date, time, and place I cannot recall.

Q. And would that point have been reached after discussions with Mr. Nixon?

A. Yes, sir, I'm sure it was.

Q. What did Mr. Nixon indicate to you a possible – his thoughts of defenses to this case would be?

A. I can't recall at this time specifically.

Q. Would he have related anything to you as possible defenses to his case?

A. He probably did.

[446]Q. And would you have talked to him about those?

A. I probably did.

Q. And would they have been rejected?

A. They probably were.

Q. And would Mr. Nixon – would he have had input in the rejection of those other defenses?

A. He probably did.

Q. He probably did or he did?

A. I assume he did.

Q. Would you have done this defense of not contesting guilt against Mr. Nixon's wishes?

A. No, sir. That's not to assume that he necessarily agreed.

Q. I think you have answered my question Mr. Corin, I think the Court will make that assumption and make that determination.

Did Mr. Nixon in some way give you any indication that he did not want to pursue the defense that was pursued?

A. Again, I think that question I've answered before maybe in the 1988 hearing. To the best of my recollection he did nothing. I think that's the answer to the question, but I can't be sure. I think that's what you are getting at.

Q. Did Mr. Nixon offer any help in the goal of [447] saving his life?

A. Not a whole heck of a lot.

Q. All right. What was the little heck of a lot?

A. Just the way he was. He told me something about his background and things like that. Most of it I had to do on my own. I really didn't get much cooperation from his family either.

Q. Did he give you any direction on how you were supposed to proceed in this case?

A. Very little, if any, that I recall.

Q. Can you describe the little?

A. I can't recall, sir.

Q. Did he tell you he wanted a trial in this case?

A. Well, we had no choice.

Q. No. What I am asking is not whether you had a choice or not. Did Mr. Nixon affirmatively tell you he wanted a trial in this case?

A. Well, if he knew that there were plea discussions going on, yes. I mean, it was just assumed all along from the beginning that this was a matter that was going to go to trial.

Q. Did he ever affirmatively state to you, I want a trial?

A. No, I just assumed he did since there was no [448] alternative.

Q. What was discussed in your meetings with the defendant?

A. I mean, I'm sure we discussed, you know, when the hearing is going to be, you know, when he was going to go to the Department of Corrections, what he told the police, why he told the police, I mean, it is all – you know, just discussed a lot of stuff.

Q. Along with the trial strategies in this case?

A. Yes, sir, I'm sure we did.

Q. Along with any leads you may have had on putting on a defense other than not contesting guilt?

A. I'm sure we did.

Q. Did you discuss the strategy of not contesting guilt with the defendant?

A. I thought I answered it. But if I didn't answer it, then, yes, he was advised as to that, yes.

Q. And how did he respond?

A. To the best of my knowledge, again, he did nothing, except after it occurred then he was not real pleased. And I think I answered that before also.

Q. Now, what do you mean by he did nothing?

A. He did nothing. I don't know. I don't know what else I can say, Mr. Evans. I have said it before.

Q. Did you talk to him about the strategy more than [449] one time?

A. I believe I did.

Q. And what was his response the other times?

A. I believe, again, he did nothing.

Q. If he refused to respond, why did you continue to attempt to discuss it with him?

A. Apparently, the same reason I am attempting to answer your questions. It just keeps coming up and coming up. I mean, I am trying to do the best I can; but I can't tell you, you know, how many times.

Q. I am not asking how many times. I am asking why did you continue to discuss that strategy with him if he never responded to you whenever you brought it up?

A. Well, because, you know, I just felt I owed it to my client to tell him what's going on.

Q. I believe you previously testified you, in fact, pled with him to give you some input as to the trial strategy?

A. Well, if I said that, then I said it.

Q. Do you recall if that occurred?

A. If I said it, it probably occurred. I don't know when I said it or exactly in the context I said it. If I said it, I said it.

Q. Would at any time you have told Mr. Nixon, Mr. Nixon you are on trial here, the State is seeking the [450] death penalty, this is the – you know, we need to put forth a defense, this is the one I think is the best is not – to concede guilt but at

the penalty phase try to save your life, talk to me, tell me something, I need some input?

A. I'm not sure I approached it in that way.

Q. In what way do you think you would have approached it?

A. I have no recollection, sir.

Q Would you have been trying to get that point across to Mr. Nixon?

A. I probably did.

Q. And were you successful in getting that point across?

A. I don't know.

Q. What do you mean you don't know?

A. I don't know.

Q. Did he –

A. I don't know whether he understood it, whether he accepted it or rejected it. To the best of my knowledge he did nothing.

Q. You had discussions with Mr. Nixon during this time period of your representation of him, correct?

Did you have discussions with Mr. Nixon during the period – this period of time?

[451]A. Which period of time?

Q. The period of time you started representing him up until the trial?

A. Yes, sir. You've asked me that question. You've asked me about my notes.

Q. Did you have conversations with him, or were they one-sided conversations? Did Mr. Nixon –

A. Probably some of each.

Q. So Mr. Nixon would interact with you during your interview sessions with him? Y'all could carry on –

A. Sometimes, yeah.

Q. But when the issue of the trial strategy came up, he refused to respond?

A. He did nothing affirmative or negative.

Q. Did the defendant at some time tell you a story that was different from the events he related to the police?

A. I'm sure he did.

Q. Why was the defendant's story not used then in the testimony?

A. I don't recall specifically why it was, but it probably was because it was either not supported by any evidence or witnesses or was –

Q. Or was what?

A. Not worth proceeding.

[452]Q. Why wouldn't it have been worth proceeding?

A. For the first part of the answer, it was not supported by the evidence of witnesses.

Q. Now during the depo back on May 9th of this year, you indicated to me that I not having been a defense lawyer did not understand how it is to represent human beings in this case or in cases like this or in criminal cases?

A. Well, that's possibly correct. I mean, I probably said that, and I probably meant it. If you haven't experienced representing the accused in criminal cases, you don't know exactly how it occurs. And each case is different, but each client is different. And some clients are helpful. Some are not helpful.

Q. In the cases where clients are not helpful, what is it like to be a defendant attorney?

A. It's a pretty tough job.

Q. Why?

A. Because you hope that you have clients that are cooperative.

Q. And if they are not cooperative, how do you handle it?

A. You do the best you can.

Q. And what do you mean by do the best you can?

A. You represent them to the best of your ability. [453] That's what I've tried to do all these years, Mr. Evans.

Q. And do you feel that you did that in Mr. Nixon's case?

A. Well, yeah, I think I did. But, you know, I suspect 15, 16 years after the fact or 5 years or 7 years – you know, people as Mr. Marky used to want to tell me in the Attorney General's Office, people flyspeck the record and Monday morning quarterback and second guess and why didn't you do this and why did you do that.

I mean, I suspect at the time the transcript – Judge Hall thought I was just one brilliant sucker. Now people might think I am just one worthless attorney, you know. But I try to do the best I can with what I have.

MR. EVANS: Your Honor, do you have a copy of the depo of Mr. Corin on May 9th?

THE COURT: Yes.

BY MR. EVANS:

Q. Mr. Corin, do you remember exactly what you said on page 19 of the second volume?

A. The Judge apparently has a copy. You've got a copy. They've got a copy. I don't have a copy.

Q. All right. That was my point. I wanted to be able to provide you with a copy. I first wanted to ask if you had any specific recollection as to exactly what you said.

[454]A. All right. I have page 19.

Q. Do you see the reference I am talking about?

A. Which specifically? Go ahead. I mean, go ahead and tell what line to direct me to.

Q. I haven't got mine with me – beginning with line 2.

A.[sic] Mr. Corin, have you had an opportunity to read over the material?

You are referring to my – all these notes, these pages of notes, year, I read through them.

Q. No, you had the wrong volume.

A. I will give it back. My fault.

Q. This is one by Ms. Winn as opposed to Ms. Hussey. It is a continuation, page 19, line 2.

A. Well, my point – well, okay?

Q. Yes, continue.

A. I am not going to argue with you. But you've never been a criminal defense lawyer. So you don't really understand exactly how it is that you represent human beings in cases. And it is just not all black and white, cut and dry. There are many times –

Q. You are going to have to try that one a little bit slower. The court reporter was having a hard time keeping up with you.

A. All right. Well, my point – well, okay. I am [455] not going to argue with you. But you've never been a criminal defense lawyer. So you don't really understand exactly how it is that you represent human beings in cases. And it is just

not all black and white, cut and dry. There are many times lawyers make decisions because they have to make them because the client does nothing.

Q. Now, do you feel in this case that you were put in that position that you had to make the decisions because the client did nothing?

A. Yes, sir. Did you want me to keep this open?

Q. No. That was it. Now, when you say Mr. Nixon did nothing in response to you trying to discuss with him the trial strategy of not contesting guilt but trying to save his life, when you say he did nothing explain what nothing means.

A. I think I testified, again, in 1988. And I think I've said before that he did nothing. He didn't say, yes, go for it or don't do it. He did nothing.

Q. Would this discussion have taken place at the Leon County Jail?

A. Well, I don't recall that it would have occurred anywhere else other than jail or perhaps in a holding cell here at the courthouse.

Q. And you would have had an opportunity to have a two-way conversation in private with Mr. Nixon?

[456]A. As I recall, there was never anybody physically with us when we discussed things – well, I take that back. There was probably a time when maybe a bailiff was available in and around the holding cell here but not at the jail.

Q. Now, did Mr. Nixon whenever you say he did nothing, did he refuse to answer your questions when you asked him what he wanted to do or if this strategy was okay with him?

A. As I recall he did nothing.

Q. Did he get up and leave the room?

A. As I recall, he never walked out of a conversation that I had at the jail, but I could be wrong.

Q. Do you ever recall him walking out of a conversation about the trial strategy that was used?

A. No, sir. Now, again, I do recall that – as I recall from my notes, my review of the notes, that the day of the – after opening statements he was not pleased when he apparently read about it in the paper.

Q. But that would have been after the decision would have been made to go forth with that trial strategy, wouldn't it?

A. Yeah.

Q. Sort of like about the horse getting out of the barn after –

[457]A. Well, yes, sir. I would have been reported in the paper.

Q. Now, he never indicated to you either verbally or by holding his hands up or by shaking his head or in any manner that he did not want the strategy you proposed and you followed through with – conducted at his trial?

A. My best recollection of the situation those many years ago is he did nothing. That's my best recollection, and I can't change it. I can't remember anything else.

Q. Now, you never filed a motion to withdraw in this case, did you?

A. No, I guess I didn't. You're telling me. You reviewed the record. I guess I didn't.

Q. It is a question. Did you ever file –

A. I don't recall filing one. I suspect I would have remembered that.

Q. If you would have had reason or grounds – legal grounds to file a motion to withdraw in the case, would you have filed a motion to withdraw in the case?

A. What would you consider legal grounds?

Q. The appellate record is full of what legal grounds are.

A. What would you consider them to be? Because the client doesn't like you? Well, if a client tells me I don't like you, you're crappy, you're a public defender, [458] and I want another lawyer, I will bring it to the Court's attention. And they can make inquiry as to whether the client wants another lawyer.

If I feel like I have an ethical conflict of interest because I might have to cross-examine a current or former client, I file a conflict. And that – generally at that point it wouldn't be brought to the Court's attention. It just goes to the Court Administrator.

Q. If you would have had to put on what you believed was perjured testimony, would you have raised the issue?

A. I've never had that situation, sir.

Q. All right. So with that being the particular case, the fact that you did not file a conflict in Mr. Nixon's case or a motion to withdraw in Mr. Nixon's case, we can assume what you just related did not occur in Mr. Nixon's case, that he did not want you fired, that he did not want you to put on perjured testimony, that there was no other conflict in the case that you were aware of?

A. It would be my routine practice if my client says, I don't want you to be my lawyer, bring it to the Court's attention, get me a hearing, get me a different judge – or a different lawyer, excuse me, then I would bring it to the Court's attention.

[459] If I had an ethical conflict, I don't go looking for cases. And as you well know, everybody in your office and the Judges all complain that we get out of a lot of cases. Well, you know, yeah, if I have a conflict, I am going to get out of it.

Q. So with the lack of any motion to withdraw being filed in this case, it is reasonable to conclude that what you just said did not occur or did not come up in Mr. Nixon's case?

A. It would be reasonable to assume that I was unaware of any ethical conflict in the representation of Mr. Nixon at that time. It would be reasonable to assume that he did not direct me to bring it to the Court's attention that he was dissatisfied with my services and wanted the appointment of other counsel.

Now, it may not be reasonable to assume that I didn't have an ethical conflict at the time because at the time we did not have access to CJIS. And so now quite often we will discover a conflict at the last minute because it turns out that people who are listed as witnesses in a given case will become our clients.

But, I mean, to the best of my knowledge I was nor – or our firm, our office, was not representing anybody who was a witness in the case which would have caused, you know, my filing of a conflict of interest.

[460]Q. Did you ever file a motion to declare the defendant incompetent?

A. I don't believe I did.

Q. And did you have either a psychologist or psychiatrist take a look at Mr. Nixon?

A. I believe I did.

Q. And are you aware of any basis for filing a motion to declare Mr. Nixon –

A. I believe if I was aware of a basis that he was not competent, I would have filed the motion.

Q. Now, as to the strategy of not contesting guilt, how did you feel by not contesting guilt that that would somehow aid in the saving of Mr. Nixon from receiving the death penalty?

A. Why did that – well, I don't know exactly how to phrase it. But Bob Dylan, I think, wrote a song saying you don't need a weatherman to tell which way the wind blows.

And so if it looks like it's not going to be a matter that is subject to any reasonable dispute, then in my opinion it would be more credible to attempt to save the man's life through indicating that there were reasons to spare his life through mitigating circumstances than going through a trial and arguing things that were not going to make a whole lot of sense.

[461]Q. Did you discuss the decision of not contesting guilt with any other attorneys?

A. Yeah, probably did, probably did.

Q. And would they have included attorneys in the Public Defender's Office as well as other private counsel?

A. Well, you mean personally whether I had discussions with anybody other than people in my office with regard to specifically Mr. Nixon, I probably didn't outside tne office.

If that strategy which people call a strategy – you know, if that way of defending a human being is a strategy and if you're asking n[illegible] do I know of other lawyers outside of my office who have discussed that strategy or that tactic or whatever, yes. The answer is yes.

Q. And who were the people in your office you would have discussed it with?

A. I can't tell you who works there today much less who was working there in 1984.

Q. Who was the public defender at that time?

A. '84? Let me see. That would have been Mr. Michael Allen.

Q. Would you have discussed it with Mr. Allen?

A. Probably not.

Q. Would Mr. Minerva have been working there?

[462]A. I don't know whether he was back at that time. You know, Mr. Allen whopped Mr. Minerva's butt in an election. So there was a period of time when Mr. Minerva was otherwise employed. But then being a good defense lawyer and Mr. Allen being a nice man, he came back to work. But whether he was there at the time, I don't know.

Q. Was Mr. Taylor there?

A. Yes, sir, Mr. Taylor was there.

Q. Would this have been something you would have discussed with Mr. Taylor?

A. Could have been.

Q. Would you have discussed it with the senior lawyers in the Public Defender's Office, someone who would have experience with death cases or capital cases?

A. I suspect at that time – I don't know who you are referring to other than Gene and I. I mean, if you give me a list of names, I may have discussed it with everybody in the office or I may have discussed it with nobody.

But, you know, I probably discussed it with somebody. And going through my notes I don't recall a note of having – you know, like sitting down and saying, okay, we sat around and did this. But, you know, I wouldn't have normally taken a note if I walked by somebody's office and discussed something with them.

[463]Q. Would this have been a strategy that would have been an original idea, or would you have gotten it from some other source?

A. Well, some people claim I never had an original idea in my life. And other people say I am so doggone inventive. I don't know. I don't know where exactly it arose, but I suspect I didn't dream it up on my own.

Q. Would your previous experience in handling death penalty appeals have entered into the decision to use the strategy?

A. It may have influenced me to some extent. I mean, I suspect I am influenced by everything I have ever done. And I have handled capital murder cases.

Q. Had you talked at this time at a public defender seminar involving the death penalty?

A. Had I? Yes, sir, I think I did. I think in 1980 or '81 we started a thing called Life over Death. And we used to meet every 12 to 18 months in Crystal River, Florida. And then they moved elsewhere. But I think I had been on – you know, been an attendee at several of those.

Q. And had you been an instructor at any of those?

A. Yeah, I think I have.

Q. So this was not an area of law that you were unfamiliar with?

[464]A. No, sir.

Q. And at those particular seminars were possible strategies discussed?

A. Yes, sir.

Q. Would this have been one of the possible strategies that was discussed?

A. Could have been. I could give you sort of an analogy if you want; but if you don't, I won't.

Q. I don't think so.

A. Okay.

Q. Now, there was something that came up during your depo. It would be the continuation of page 17. It would be toward the bottom beginning at line 18, through 23.

A. You want me to go ahead and read it again?

Q. Yes, I do.

A. I will read it slowly.

Answer: I mean, I don't recall since 1984 specifically sitting in a room and discussing exactly what occurred and jotting his reactions and videotaping. I don't have that kind of recollection. I did take notes. My notes are what they are. The best I can recollect is what I recollect. It may or may not be true, but that's the best I can recollect.

Q. What do you mean by it may or may not be true?

[465]A. I don't know whether my recollections are true or not. They are my recollections. You know, I have lived with this situation for many years. And, you know, it is just – I am a human being.

And every time you think about something, you color things one way or another. You look at things in a different light. You look at things in a different way. And I've tried not

to think about this all that often in the last 15 or 16 years. But like I say, it keeps coming up.

And if you tell me – you know, if you tell me what occurred in this courtroom today two weeks from now, you know, if I watch the camera and I listen to the tape, I can say, yeah, that's what happened. But, you know, if you're asking me to identify who is coming in and out of this courtroom or exactly what happened, I will give you my best recollection. That's all I can do.

Q. Now, you're [sic] notes, do they reflect that the defendant said nothing, or do they reflect the defendant's response whatsoever?

A. I don't know – I mean, I would have to go through them again. But I think they don't reflect anything either way. I think – as I recall my notations from going through, it said, discuss strategy. And I don't recall that there was anything else written one way [466] or the other.

Q. Why would there have not been a notation?

A. I just didn't make a notation.

Q. Did you make notations of significant events in this case?

A. Sometimes, yeah. Maybe I didn't record everything that was of significance. But I try to do what I do. I mean, I don't know what to tell you. If you are saying I did something wrong because I didn't write a note, then maybe I did.

Q. No. What I am getting at – there were notations abut the defendant wanting a radio, the defendant needing clothes, the defendant wanting to talk to his mama, the defendant

wanting to see somebody or do this, notes of the most minimal nature about events.

A. Not to my client they are not.

Q. But when it came to something as significant as Mr. Nixon's reactions to the discussions of strategy, there are no notes?

A. I suggest the significance of that is more apparent to you than it was to me at the time. I think Mr. Marky wants to say something.

Q. I think he indicated he didn't consider that an answer. Now, why were there no notes of that?

A. I have no idea, sir.

[467]Q. You made the notes, and you have no idea why you didn't write something down that you knew would later be of utmost significance because –

A. I did not know that. You are saying it is of utmost importance. I did not know anything was going to be of utmost importance.

Q. Now, at this stage when you were taking notes and discussing with Mr. Nixon, you had an opportunity – of your experience you had the opportunity to discuss with other lawyers the strategy of conceding that the State was going to be able to prove its case beyond a reasonable doubt or not contesting the guilt of the defendant. That was the strategy you employed, was it not?

A. What's your question?

Q. My question then is –

A. You know what I did. I can't change what I did. If you call it a strategy, then you can assume it is a strategy. If you call it a tactic, it is a tactic. It is a matter of fact what occurred.

Q. And you indicated earlier that you knew that this would be reviewed by the appellate courts in detail?

A. Of course, in a death case all matters are automatically reviewed.

Q. And you thought enough of this strategy and developing this strategy to discuss it with the defendant, [468] to discuss it with other lawyers –

A. Now, wait a minute. I don't think I said I discussed it with other lawyers. I said, I may have discussed it with other lawyers. And I probably discussed it. But if I did, I can't tell you exactly who it would have been.

Q. But this was a significant decision in this case that you knew would have repercussions at a later date?

A. No, I didn't know that it was necessarily going to have repercussions. In fact, most lawyers are unfaltering optimists. And, you know, I suspected in my infinite capacity for forgiveness and hoping as to hope that things will come out the right way, I was kind of hoping this would never go any further.

Q. And you did not consider the fact that you were using this strategy and Mr. Nixon's response to it significant enough to put in your notes except for two occasions?

A. I did not write anything down in my notes about that to my recollection.

Q. Now, at some point you had an opportunity to discuss with Mr. Guarisco a plea agreement?

A. Yes, sir.

Q. And there are reference to your notes that the plea was for all day. What does that mean?

[469]A. Life.

Q. Now, did you get Mr. Nixon's permission to discuss a plea to life with Mr. Guarisco?

A. I don't recall if I specifically did or not.

Q. Would it have been something you would have discussed with Mr. Nixon?

A. It may or may not have been. Many times as a defense lawyer I believe it is in my client's best interest to secure or to attempt to secure a plea negotiation. And whether I get advance permission to do that, probably a huge percentage of the time I do not. And, of course, they always have a right to reject it anyway.

Q. Now, on page 3 of your notes – and I'm referring to what would be page 3 of the Document ID Number 1, the Michael M. Corin review notes – or interview notes, excuse me.

A. Yes, sir.

Q. Now, at the bottom there –

A. The very bottom?

Q. Just above where it says Mike, the seven, either twelve or twenty-two, eighty five?

A. Right, the p.m. notation?

Q. Yes.

A. Yes, sir.

[470]Q. What is the last line of that notation?

A. You want the whole note, or you just want me to say what it appears that my writing was? The entire notation appears that on July the 22nd of 1985 sometime in the afternoon the defendant's mother, Ms. Nixon, called my house, reference testimony/subpoena. I begged her to come to court Wednesday. She wants no part of it. And the last part looks like, admits defendant not right. And I may have put like an exclamation point. I believe that's the substance of that notation.

Q. And so that notation is not right – the defendant not right. That was something that was made by the –

A. By me – I mean, that was my notation probably referring back to something that his mother had said.

Q. So at that stage of this particular hearing, his mother was not willing to help in this defense or –

A. That was my impression, yes sir.

THE COURT: Mr. Evans, before you proceed, if I could just clarify. The notation or the actual note is that, it's not right? Is that correct? In the document can you –

THE WITNESS: You mean my handwriting?

THE COURT: Yes. What does your handwriting say?

[471] THE WITNESS: The notation – let me read it again. July – or 7-22-85-p.m. D's mom, meaning Mr. Nixon's mother, Ms. Nixon, called house, reference testimony/subpoena – I begged her to come to court Wednesday, I believe. She wants no part of it.

And then my next line says, admits – and I assume I am referring back to Ms. Nixon, although, you know, I can't be sure – that D, the defendant, is not – or D not right, is not right, not mentally together or, you know, not what you call your normal kind of person.

THE COURT: Thank you, Mr. Evans and Mr. Corin.

BY MR. EVANS:

Q. Now, at the time that you started putting forth the defense – or putting forth or engaging in the strategy of not contesting the guilt to the jury, did you feel that you had been put in the position of having to make the decision on the appropriate strategy in the case because Mr. Defendant had abandoned his responsibilities as a criminal defendant in giving you some guidance in how he wanted to be defended in this case.

MR. FREEDMAN: Object to the form, Your Honor.

THE COURT: Could you rephrase that, Mr. Evans?

BY MR. EVANS:

[472]Q. Did Mr. Nixon abandon his responsibilities in giving you some guidance no how this case should be defended?

A. I don't know that a defendant has any required responsibilities to do anything. But if you're asking did he tell me, again, that I want you to do this or I don't, no, he didn't.

Q. No. What I'm asking you is, did he give you any guidance on how he wanted to be defended?

A. Well, I've answered that question before as many times and as good as I can. If you're asking me again – and I think you phrased this kind of inadvertently as a defense, but then you said the word strategy – but did he give me guidance on this in terms of doing it or not doing it, no, he said nothing.

Q. No. Did he give you guidance on any strategy he wanted employed at this trial?

A. I think I answered – and I mean, I don't know what to tell you. I think I answered that question. We discussed other things at one point in time I'm sure. But when I told him that this is the strategy that I intended to employ, he did nothing.

Q. And my point is – and I think we've covered it. And this was part – since it was sort of a long question it assumed this part, the part – the fact that [473] Mr. Nixon and you had talked about other possible strategies in this case?

A. Yes, sir, I think I answered that question. And I think that was probably true.

Q. And I believe you've also answered that Mr. Nixon never told you he wanted any particular strategy followed or not followed?

A. Yes, sir, I believe that was my answer; and that's my best recollection.

Q. So that puts you in the position of being the captain of this ship because Mr. Nixon had abandoned his post?

A. That's one way you could phrase it, sir. I didn't phrase it that way, but you phrased it that way.

Q. But that was the result of Mr. Nixon's actions. You had to make the decision because –

A. Or inaction.

Q. Or inaction?

A. Yes, sir.

Q. But by Mr. Nixon's actions or inactions he left it solely up to you to make the decisions in this case because he refused your requests for help?

A. Well, I don't know that that latter part is correct.

Q. How did he help you then?

[474]A. I never said he did, did I? You are asking me, how did he help you? I never said he helped me.

Q. Did you ask him for his help?

A. I don't know that I ever phrased it that way. You know, back to the things like I made a note that he wanted batteries or he wanted clothes or he wanted a haircut or something, you know, the reason I make notes of that is because it is very important to some of my clients that are facing serious things to have the minor things in life convenient.

But that doesn't necessarily mean that they are also interested or not interested in the outcome of their case. You know, it is their daily life that they are more focused on than it is their forever future sometimes. That's not an unknowing occurrence.

Q. Is it your testimony that Mr. Nixon was facing the death penalty and he wasn't concerned about whether or not he was going to receive the death penalty?

A. I didn't say that. What I said is quite often clients will focus on minor things –

Q. And while I –

A. – to the –

THE COURT: Just one at a time for the court reporter.

BY MR. EVANS:

[475]Q. While I understand that, I'm asking about Mr. Nixon.

A. If you're asking me, was he focused on minor things as opposed to the big picture? Sometimes he was, yes, sir.

Q. And was he ever focused on the big picture of saving his life?

A. You have to ask him that.

Q. You were trying to represent him, and did you ask him if he was interested in saving his life?

A. I don't think I've ever asked any client directly that with that phraseology.

Q. Well, how about that general theme? If we are going to get down to nitpicking I am –

A. I'm not – sir –

Q. What about the general theme? Did you ever get to the point of inquiring whether or not Mr. Nixon wanted to be defended against this charge?

A. Well, I assume he did.

Q. What brought you to that assumption? Did he do anything to lead you to that assumption?

A. He didn't tell me to bring him to court and enter a plea of guilty.

Q. Did he tell you he wanted a trial?

A. He didn't tell me he wanted to enter a plea.

[476]Q. Did he tell you he wanted a trial?

A. I don't specifically recall whether he did or not. It didn't matter. Whether he wanted one or not, he was going to get one.

Q. He could have entered a plea straight up to the Court, couldn't he?

A. Well, he could have if he had asked for it, but he didn't ask for it.

Q. Did you discuss that possibility with him?

A. No, sir.

Q. Why not?

A. Well, because a plea straight up to the Court would have been unavailing. There would have been no benefit of that at all.

Q. In what way would it have been different than what you did?

A. I didn't plead him guilty.

Q. What did you do?

A. You read the transcript. You can determine what – everybody calls it something different. Some people say, well, you pled your client guilty. Other people say, you conceded that the State was going to have proof beyond and to the exclusion of every reasonable doubt.

Other people say, well, you didn't contest the [477] State's case in a vigorous fashion; and, thus, it is tantamount to a guilty plea. Other people say, well, you know, what choice did you have? You didn't argue something that common sense would tell you would be unavailing to the extent that credibility might be compromised at the second phase.

I mean, everybody calls it something different. I mean, it is what it is. I can't change what occurred.

Q. In your mind it is not tantamount to pleading your guy guilty?

A. No. I mean, I don't know. I mean, what does my mind matter? I mean, people have been studying this thing for years. And the Judge is going – it's what's in her mind that matters.

Q. I'm afraid that at this point what you were thinking at that time or what Mr. Nixon was thinking at the time or what the two of ya'll were communicating together or lack of communication at the time is directly relevant and very, very important to a determination of what occurred and why it occurred.

A. Well, I've answered your questions to the best of my ability. What goes on in his mind, hey, I'm not a shrink.

Q. But he never indicated to you that he wanted a trial in this case?

[478]A. I've told you before what I've told you, and I can't change what I've told you. I think I've answered the question. Maybe not.

Q. And he never indicated to you that he wanted to enter a guilty plea?

A. No, sir, he didn't indicate he wanted to enter a guilty plea.

Q. And he never indicated to you that he wanted his life to be saved?

A. Oh, I think – he never indicated he didn't want his life to be saved.

Q. All right.

A. So I assume that means that they don't want to die. I mean, I've had clients who at one point in their representation said, hey, I want to die.

Q. But my question –

A. And I take that with a grain of salt.

Q. But my question is, did Mr. Nixon tell you he did not want to be executed for this crime; or was that an assumption you made on your own?

A. I can't recall him specifically saying, Mike, you know, I don't want to be executed for this crime. I can't recall him saying that. It may have been just a foolish assumption on my part which has now created however many years of litigation which has the effect of [479] prolonging his life which I assume he wants.

THE COURT: Mr. Evans, if we could, at this point I think it is incumbent on me to call a brief recess so we can give our court reporter and everyone a little break. If we could take about 15 minutes, then we will return and perhaps conclude Mr. Corin's cross-examination.

(Court is in recess.)

THE COURT: All right. You may proceed, Mr. Evans.

BY MR. EVANS:

Q. Mr. Corin, we discussed previously about a plea to – I am assuming a plea as charged to a life sentence on Mr. Nixon's case that you had offered to the State?

A. Yes, sir.

Q. Now, did the State reject that offer?

A. Yes, sir.

Q. And who from the State was this offer discussed with?

A. I think my notes reflect that I talked to Mr. Guarisco and probably talked to Mr. Hankinson over the period of time. I mean, I probably tried several times to do something other than go to the trial. That's my nature.

Q. Mr. Guarisco and Mr. Hankinson were the trial [480] attorneys on the case?

A. As I recall.

Q. And Mr. Guarisco is and was the deputy state attorney of the Second Judicial Circuit at the time?

A. Yeah, probably so. I mean, I think he was gone for a while. But then I think that Mr. Meggs was the State Attorney the, and Mr. Modesitt had been unelected. Tony left for a while, and then came back.

Q. And do you recall any words that he used in rejecting?

A. I think my notes might have – and I put them away. But I think that there was a note there maybe of roll the dice. And I think that was probably attributable to him.

Q. And what did those words mean to you?

A. We are going to have a trial and let the chips fall where they may.

MR. EVANS: No further questions.

MR. LANG: We have no other questions.

THE COURT: All right. Very good.

MR. EVANS: I am assuming the defense has rested?

MR. LANG: Yes, that's correct.

THE COURT: All right. Very good. I thought there was another witness.

[481]MR. EVANS: We are waiting on Mr. Moore to come down.

THE COURT: All right. So you are going to be calling Mr. Moore as your witness then?

MR. EVANS: Yes. And, Your Honor, my concern as – about the notes, I believe Mr. Corin's notes as well as the other documents supplied to us from the Public Defender's Office and placed under seal with the Court, some of which were released to us unobjected to by the defense and others that were objected to by the defense but were released to us pursuant to your protective order, that those items need to be placed in evidence.

And we would ask that they would be placed as State's Exhibit 1 in this hearing. Now, how you want to manage those – we want those to be part of the record, part of the evidence in this hearing.

If you wish those to remain under seal from the public, then that's a decision you need to make and – but it is part of the evidence that the State is wanting to put forth at this hearing.

THE COURT: All right. Mr. Freedman?

MR. FREEDMAN: We object, Your Honor. First of all, if he was going to offer them into evidence, he should have done it with the witness on the stand.

[482] MR. EVANS: Well, he is a defense witness at this stage, Your Honor.

MR. FREEDMAN: And, second, and more to the point, everyone's interests have been served with these notes at the hearing for whatever use they had. Now, with respect to the appellate record, Your Honor has already taken care of that. So,

in effect, all you will be doing is creating another issue if you now put those into the record unnecessarily.

THE COURT: Well, here is what I will do. And certainly, gentlemen, in terms of the procedure that might be appropriate at a trial and for purposes of this hearing I would certainly view it a little differently.

I will allow the State to introduce the notes for whatever – certainly, some of them are relevant. And Mr. Corin has already discussed some of those relevant notes. Others are completely irrelevant. But to keep the entire package together I will admit them as State's Exhibit Number 1.

However, I will seal them. So in other words, they will be contained in the record in sealed envelopes so it will proceed up to the Supreme Court in that form, okay?

MR. EVANS: That is acceptable, Your Honor. And [483] for the purposes of why they are relevant, their case file from the Public Defender's Office indicates that there as a lot of investigation, a lot of thought, a lot of notes, including the jury selection notes that we referred to and the pretrial notes we referred to and the personal notes of Mr. Corin.

All of those are evidence that Mr. Corin thoroughly thought out the strategy before it was imposed, and it is evidence that he did so. And that was the relevance of those. And when Mr. Moore gets here, we will be calling him.

THE COURT: I'm sorry. Mr. Evans, your first witness will be –

MR. EVANS: Tommy Moore, the investigator at the Public Defender's Office, their chief investigator now.

(Brief pause.)

THE COURT: Mr. Moore, if you would raise you right hand, please.

Whereupon,

TOMMY MOORE

was called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. EVANS:

[484]Q. Would you state your name for the record, please, sir.

A. My name is Tommy L. Moore.

Q. And what is your occupation?

A. Investigator – chief investigator, Public Defender's Office, Second Judicial Circuit.

Q. And how long have you been the chief investigator?

A. Probably about 10 years.

Q. And how long have you been an investigator at the Public Defender's Office?

A. Since 1973.

Q. And were you the investigator assigned to Mike Corin at the time of the Nixon case?

A. Yes, I was.

Q. And were you the only investigator on the Nixon case?

A. Yes.

Q. Now, what type of contact did you have with Mr. Nixon?

A. I seem to think I had maybe the initial interview and maybe one other contact with him.

Q. Would you have done a written report on the contacts that you would have done with him?

A. Yes.

[485]Q. Now, would you have discussed any trial strategy with Mr. Corin?

A. No.

Q. How about any trial strategy with Mr. Nixon?

A. No.

Q. Would you have accompanied Mr. Corin on any interviews of the defendant?

A. I don't remember accompanying him on any, no.

Q. Now, when you had an opportunity to talk to Mr. Nixon, did he appear to be mentally alert and able to comprehend what you were saying to him?

A. As I remember, I thought so.

Q. And did he appear to you that he understood that he was charged with murder and what the possible consequences were?

A. I think he understood what he was charged with. Again, I didn't get into a lot of the part of lawyering stuff.

Q. And is that something you explained to Mr. Nixon, that his lawyer would get into the substance of the offense?

A. Exactly, yeah.

Q. Before the trial did Mr. Corin contact you about having any problems with his – with him communicating with Mr. Nixon?

[486]A. Before the trial?

Q. Yes.

A. I'm not sure. I'm not sure. I know – like I said, I know at one time during court, but I'm not sure about any prior times. It's just been so long.

Q. But that would have been the trial itself that you are referring to?

A. Uh-huh.

Q. Now, did you have an opportunity on January 24, 1985 to interview Mr. Nixon at the Florida State Prison?

A. Yes.

Q. And what was the purpose of that interview?

A. To get some background information and, I guess, just background information basically.

Q. Background information including where he went to school and –

A. Right. Different parts of his life and who he had contact with, just some important people in his life as he came up through the years.

Q. And how long was that report that you –

A. Say that again, please.

Q. And how long was that report that you –

A. Say that again, please.

Q. How long was the report? How many pages?

A. It looks like about four and a half.

Q. And they are legal size pages?

A. Legal size, yes, sir –

[487] MR. FREEDMAN: Your Honor, that's the Document ID Number 6 that's being referred to.

THE COURT: Thank you.

MR. EVANS: It is in Document ID Number 6, the specific is the investigative memorandum from Tommy Moore on 1-24-85.

BY MR. EVANS:

Q. Now, there are approximately four and three quarter legal size pages of him giving you his background; is that correct?

A. Yes.

Q. So he was able to communicate with you and understand what you were asking for?

A. Yes.

Q. And he was able to put it in great detail?

A. I guess. I got the information I needed to work with. And that was, yeah, pretty detailed I guess.

Q. Now, at some point did you make a notation that Mr. Nixon had inquired as to the number of witnesses the State had and the State's witness list?

A. Yeah, I saw that in here somewhere yesterday if I can find it.

Q. I will refer you to page 4.

A. Page 4?

Q. The last paragraph where it says, defendant [488] asked me about the witness list.

A. That the State have against him – what was your question now?

Q. All right. Now, who made the inquiry? Did you bring the subject up, or did Mr. Nixon bring the subject up?

A. About?

Q. About the number of witnesses and the State's witness list.

A. According to my notes the defendant asked me about the witness list. I just appears from my notes here – I mean, from my memorandum there.

Q. And you also indicated to him that you were mainly concerned with the background at this point?

A. Right.

Q. And that his attorney would be discussing the other matters with him?

A. Exactly.

Q. Did he appear to you to understand that?

A. I think so.

Q. Did you make a notation in your report that he seems to understand this?

A. Right, I did.

Q. Did he indicate how many people he thought there would be called by the State?

[489]A. According to my memorandum he stated around 60 or 70.

Q. All right. And this was after you had told him that his lawyer would go over that?

A. I think that's the order of it, yes.

Q. And did you ask him how he guessed that?

A. I think I did. I asked him, how did he guess that? And he stated, from somewhere. He just heard it somewhere, I guess. I'm not sure how he came to that conclusion.

Q. That he had heard there were going to be quite a few witnesses?

A. I guess he had heard it through some source or whatever.

Q. Did he also indicate whether or not he should have made any statements to the police?

A. According to my notes, again, he stated that he felt like he shouldn't have made any statements. And I – according to my notes, I agreed with him.

Q. Did you indicate in your notes whether or not – what type of control the defendant had over himself?

A. Just a little nervous, you know, nervous laughter or nervous type of – whatever when somebody – I'm not sure what I'm saying other than –

Q. What did you write in your report?

[490]A. Defendant had a nervous laughter during the interview.

Q. And in that same sentence?

A. But seemed as though he was in control.

Q. And you indicated complete control, didn't you?

A. Complete control, yeah.

Q. And the next sentence, did the defendant appear to you to be anxious about what the State had against him?

A. Yes, uh-huh, and how the case was looking.

Q. And how the case was looking.

A. Yeah, how bad.

Q. Did he describe how the case was looking against him? What does the sentence say?

A. Okay. He was anxious to see what the State had against him and how bad the case was looking.

Q. And the next line?

A. He mentioned on several occasions to me that it looked pretty bad. I told him that I was not familiar enough with the actual pending case to agree or disagree on how the case was looking at this point.

Q. And you indicated again to him that his lawyer would go over that with him?

A. Right.

MR. EVANS: Your Honor, I believe this memo has previously been placed into evidence.

[491] THE COURT: As part of the sealed exhibit I assume.

MR. FREEDMAN: It hasn't been previously placed into evidence. But preserving our objection, if you wish to handle it

according to the way you just handled Exhibit 1 that would make sense.

THE COURT: All right.

BY MR. EVANS:

Q. In that case, Your Honor, Mr. Moore, did you use this information – was it recorded at the time that the events were fresh in your mind?

A. Yeah, within a day or two when I took the notes or whatever and got back to transcribe it and put in on my dictation.

Q. And have you relied upon this report in your testimony here today?

A. Completely.

Q. And is it, in fact, from what that appears to be that is your report?

A. Yes.

Q. You remember going and seeing Mr. Nixon on that day and doing your report?

A. Vaguely, I think so.

MR. EVANS: Your Honor, at this time we would move that in as State's Exhibit Number 2.

[492] THE COURT: All right. Just so the record is clear, again, in regard – and I'll have these exhibits or each exhibit as they were marked by the defense in regard to the protective order request – this is a separate exhibit, is it not, Mr. Moore's notes?

MR. EVANS: Yes.

MR. FREEDMAN: It is a part of Document ID Number 6.

THE COURT: All right. Well, we will identify that then as State's Exhibit Number 2. And this will be the package that is Document ID Number 6.

BY MR. EVANS:

Q. And all the reports contained in Document Number 6 are your notes?

A. Yes.

MR. EVANS: Okay.

THE COURT: And, again, for the purposes of the record, there was one document that was removed from the exhibit by the Court that would not – that would be sealed separately and not with the rest of the exhibits.

MR. EVANS: I believe we placed that document or the references of that document on record I think.

THE COURT: Keep them all straight. All right. [493] Any further questions, Mr. Evans?

MR. EVANS: No.

THE COURT: Mr Lang?

MR. LANG: Just one.

CROSS-EXAMINATION

BY MR LANG:

Q. Mr. Moore, did you ever hear Joe Nixon affirmatively consent to his lawyer conceding his guilt?

A. No.

MR. LANG: No other questions.

REDIRECT EXAMINATION

BY MR. EVANS:

Q. Mr. Moore, did you previously testify that you did not have any discussions with Mr. Corin or Mr. Nixon as to the strategy that was going to be used in this case?

A. Yes.

Q. When did you first learn of the strategy that was going to be used in the case?

A. I guess with everybody else after it was in the paper or later on in – you know, it was just out. It was after it happened.

Q. It was after the trial had commenced?

A. Right.

MR. EVANS: No further questions.

THE COURT: Any recross examination, Mr. Lang?

[494] MR. LANG: No, Your Honor.

MR. EVANS: The witness may be excused, Your Honor.

THE COURT: Thank you, Mr. Moore.

MR. EVANS: Your Honor, the State at this time would rest.

THE COURT: All right. What I will do, gentlemen – and, Mr. Lang, hopefully we can handle this informally. I will allow you-all to present your argument and the State to then present its argument.

MR. EVANS: Your Honor, Mr. Lang and I, I think, had indicated – I think Mr. Lang had indicated that this might be submitted in writing.

THE COURT: Oh, if you would prefer to do that –

MR. EVANS: I knew you had said something earlier on.

THE COURT: Let me say this, gentlemen. I do want to ask you-all for a memorandum from each side. And if you would prefer to just dispense with any oral argument today, that would be fine. I would be delighted to receive anything you would like to argue by way of memorandum.

But I would like to have you each in writing [495] articulate your positions formally for me before I draft my order. Would you –

MR. MARKY: The State would accept that.

THE COURT: Okay.

MR. LANG: Your Honor, if you prefer to have the written briefs or memoranda, then whatever we would say here we would – well, Mr. Marky would probably say it better orally than I would. But, certainly, I would say it better in writing than if I tried to speak about it.

MR. MARKY: You've got to be kidding.

THE COURT: I just certainly want to provide you with the opportunity to do anything you prefer to do by way of oral argument. But I am happy to receive the documents in writing if you prefer to do that. And I knew there has, obviously, been a lot written already in regard to this case. And I would be happy to just handle it that way. Is that all right?

MR. EVANS: I have no objection. I would love to rip and snort today, but my co-counsel has sort of reined me in on that issue.

THE COURT: The planets are not lined up properly if that's the case.

MR. LANG: So I guess we just need a schedule, I guess, that would key off of when the transcript is [496] available.

THE COURT: Good question. Sonia, I mean, a reasonable amount of time for you?

THE COURT REPORTER: Whenever you would like it, Judge.

THE COURT: Do you think in about 10 days the transcript would be available?

THE COURT REPORTER: That's fine.

THE COURT: The transcript will be available according to our wonderful court reporter here, in about 10 days. That would put us at – all right, Monday, May 21st hopefully the transcript will be available absent any unforeseen – and then, gentlemen, how much time do you feel you need to review the transcript and provide me with your written memoranda?

MR. EVANS: Your Honor, I'm wondering if – I'm assuming since the burden – are they going to file their memoranda, and then we respond to it? Or are they going to be contemporaneously filed?

THE COURT: You mean as to whether they will have an opportunity to reply?

MR. EVANS: Basically it is a situation where it's their motion, their burden. Are they going to put on, then we respond, and if they have anything to [497] reply?

THE COURT: My original intention was just to receive memoranda separately unless you-all feel if there is any – let me say this. Let me ask for your memoranda at the same time. And then if you want to respond, I will give you another date to do that, is that all right, to each other's position?

MR. LANG: That sounds fine, Your Honor.

MR. EVANS: That's fine.

THE COURT: Thirty days sound like –

MR. EVANS: Yeah, 30 days from the receipt of the transcript.

THE COURT: Thirty days after the transcript, so it would be essentially around June 21st. How about June 22nd which is a Friday?

MR. MARKY: That's fine.

MR. EVANS: And then either –

MR. FREEDMAN: A week for reply.

MR. EVANS: Let's do 15 days to reply. What is two weeks after that date?

THE COURT: That would be July 6th. All right. Just to review, gentlemen, then hopefully the transcript will be available to you on the 21st of March.

MR. EVANS: May.

[498] THE COURT: I'm sorry, May. It starts with an M – 21st of May. By June 22nd I'd ask that each side submit your memoranda to me. And then I will allow you until July 6th to respond to each other's memorandum or any further comments you would like to make about the other side's position by that time, okay?

MR. MARKY: Wonderful.

MR. FREEDMAN: Thank you, Your Honor.

THE COURT: Thank you, gentlemen, very much.

(End of proceedings.)

[499](Certificate of Reporter omitted in printing)

SUPREME COURT OF FLORIDA

Nos. SC92006, SC93192 & SC01-2486

JOE ELTON NIXON,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

JOE ELTON NIXON,
Petitioner,

vs.

JAMES V. CROSBY, JR., etc.,
Respondent.

JOE ELTON NIXON,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[July 10, 2003]

PER CURIAM.

Joe Elton Nixon, a prisoner under a sentence of death, appeals an order of the trial court denying his motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. Additionally, he files a petition for writ of habeas corpus with this Court. We have jurisdiction. See art. V, § 3(b)(1),(9), Fla. Const. For the reasons that follow, we remand this case to the trial court for a new trial.

FACTS AND PROCEDURAL HISTORY

Joe Elton Nixon was charged, convicted, and sentenced to death for the 1984 murder of a Tallahassee woman. This Court affirmed the conviction and sentence on direct appeal. See Nixon v. State, 572 So.2d 1336 (Fla. 1990).[1] The United States Supreme Court denied Nixon's petition for a writ of certiorari. See Nixon v. Florida, 502 U.S. 854 (1991). Subsequently, in 1993, Nixon filed a rule 3.850 motion, which the trial court denied without an evidentiary hearing. Nixon appealed the trial court's summary denial of his 3.850 motion to this Court. Additionally, Nixon filed a petition for a writ of habeas corpus with this Court. Nixon raised seven issues relating to the denial

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[1] Hereinafter referred to as Nixon I.

of his rule 3.850 motion[2] and three issues in his habeas petition.[3] See Nixon v. Singletary, 758 So.2d 618 (Fla. 2000).[4]

In Nixon II, this Court found Nixon's claim that he was denied the effective assistance of counsel when his lawyer conceded guilt without his consent to be the primary issue in the case. Nixon's counsel made the following statement during opening argument of the guilt phase:

> In this case, there will be no question that Jeannie [sic] Bickner died a horrible, horrible, death. Surely she did and that will be shown to you. In fact, that horrible tragedy will be proved to your satisfaction beyond any reasonable doubt. In this case, there won't be any question, none, whatsoever, that my client, Joe Elton Nixon, caused Jeannie [sic] Bickner's death. Likewise, that fact will be proved to your satisfaction beyond any reasonable doubt. This case is about the death of Joe Elton Nixon and whether it should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement.

Nixon, 758 So.2d at 620.

During closing argument, Nixon's counsel made the following statement:

> Ladies and gentlemen of the jury, I wish I could stand before you and argue that what happened wasn't caused by Mr. Nixon, but we all know better. For several very obvious and apparent reasons, you have been and will continue to be involved in a very uniquely tragic case. In just a little while Judge Hall will give you some verdict forms that have been prepared. He'll give you some instructions on how to deliberate this case. After you've gotten those forms and you've elected your foreperson and you've done what you must do, you will sign those forms. I know you are not going to take this duty lightly, and I know what you will decide will be unanimous. I think that what you will decide is that the State of Florida, Mr. Hankinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson.

Id.

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[2] The issues raised in Nixon's appeal of the denial of his 3.850 motion were: (1) whether the circuit court denied him a full and fair hearing on his ineffective assistance of counsel claim; (2) whether he was denied his right not to be tried while mentally incompetent; (3) whether his death sentence had to be set aside because his counsel failed to make an effective argument for sparing his life and presented evidence that was harmful to his case during the sentencing phase of the trial; (4) whether he was denied a competent mental health evaluation in violation of Ake v. Oklahoma, 470 U.S. 68 (1985); (5) whether he was entitled to prove his claims under Johnson v. Mississippi, 486U.S. 578 (1988), that the two prior convictions used as aggravating circumstances lacked validity; (6) whether he should have the opportunity to prove that race discrimination tainted his conviction and death sentence; and (7) whether the jury weighed invalid and unconstitutionally vague aggravating circumstances in violation of James v. State, 615 So.2d 668 (Fla. 1993), and Jackson v. State, 648 So.2d 85 (Fla. 1994).

[3] In his habeas petition Nixon argued that: (1) appellate counsel failed to raise on direct appeal any issue regarding Nixon's competency to stand trial; (2) appellate counsel failed to properly preserve Nixon's claims under Ake v. Oklahoma; and (3) appellate counsel failed to properly preserve Nixon's claims under James v. State and Jackson v. State.

[4] Hereinafter referred to as Nixon II.

On appeal, the parties were in disagreement regarding the appropriate standard of review to be applied in this case. The State argued that the standard explained in Strickland v. Washington, 466 U.S. 668 (1984), should be applied, whereas Nixon argued that because counsel's concessions amounted to per se ineffective assistance of counsel, the United States v. Cronic, 466 U.S. 648 (1984), standard was the proper test. Ultimately, this Court held that if Nixon could establish that he did not consent to counsel's strategy, then the Court would find counsel to be per se ineffective under the Cronic standard. This Court reasoned that the Cronic standard should apply because:

> Although statements made by attorneys in closing arguments are not evidence, nevertheless, for all practical purposes, counsel's admission of guilt on behalf of his client denied to petitioner his constitutional right to have his guilt or innocence decided by the jury. Petitioner, in pleading not guilty, was entitled to have the issue of his guilt or innocence presented to the jury as an adversarial issue. Counsel's complete concession of petitioner's guilt nullified the adversarial quality of this fundamental issue.

Nixon, 758 So.2d at 623 (quoting Wiley v. Sowders, 647 F.2d 642, 650 (6th Cir. 1981)). Since counsel's comments operated as the "fundamental equivalent of a guilty plea," this Court concluded that "Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon's of counsel's strategy. Silent acquiescence is not enough." Id. at 624. To avoid similar problems in the future, this Court said:

> [W]e hold that if a trial judge ever suspects that a similar strategy is being attempted by counsel for the defense, the judge should stop the proceedings and question the defendant on the record as to whether or not he or she consents to counsel's strategy. This will ensure that the defendant has in fact intelligently and voluntarily consented to counsel's strategy of conceding guilt.

Id. at 625 (citations omitted). Accordingly, we remanded the case to the trial court to hold an evidentiary hearing on the issue of whether Nixon consented to trial counsel's strategy.[5]

On remand, an evidentiary hearing was held before Judge Janet Ferris on May 11, 2001. Although Nixon was present at the evidentiary hearing, he did not testify; the only witness presented was Michael Corin, Nixon's trial counsel. After the hearing, the trial court denied relief and found that Nixon consented to counsel's strategy. This appeal followed.[6]

LAW AND ANALYSIS

The dispositive issue is whether Nixon is entitled to a new trial under this Court's decision in Nixon II. In reaching the merits of his issue, this Court must decide whether there is competent, substantial evidence to support the trial court's conclusion that Nixon consented to trial counsel's strategy of conceding guilt.[7] In Nixon II, this Court directed the trial court

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[5] This Court declined to address the remaining issues in Nixon's 3.850 appeal. Additionally, this Court opted not to address Nixon's habeas claims given its disposition of his 3.850 appeal.

[6] This appeal includes not only the Strickland/Cronic issue but also the seven issues not addressed in Nixon II. Because we grant relief on the ineffective assistance of counsel claim, we do not address the other issues or the claims raised in the habeas petition.

[7] Generally, our standard of review following a denial of a 3.850 claim after holding an evidentiary hearing affords deference to the trial court's factual findings. "As long as the trial court's findings are supported by competent substantial evidence, this Court will not 'substitute its judgment for that of the

to conduct an evidentiary hearing to determine whether evidence existed which indicated an "affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough." 758 So.2d at 624. Nixon never testified at the evidentiary hearing on this issue. On direct examination, trial counsel repeatedly testified that Nixon did nothing when asked his opinion regarding this trial strategy:

> Q: [Nixon's Postconviction Counsel] Did you discuss the strategy of not contesting guilt with the defendant?
>
> A: [Corin] I thought I answered it. But if I didn't answer it, then yes, he was advised as to that, yes.
>
> Q: And how did he respond?
>
> A: To the best of my knowledge, again he did nothing, except after it occurred that he was not real pleased. And I think I answered that before also.
>
> Q: Now what do you mean by he did nothing?
>
> A: He did nothing. I don't know. I don't know what else I can say, Mr. Evans, I have said it before.

Corin further testified that Nixon provided neither verbal nor nonverbal indication that he did or did not wish to pursue

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trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" McLin v. State, 827 So.2d 948, 954 n.4 (Fla. 2002) (quoting Blanco v. State, 702 So.2d 1250, 1252 (Fla. 1997)).

counsel's strategy of conceding guilt.[8] Thus, at most, this testimony demonstrates silent acquiescence by Nixon to counsel's strategy.

The trial court indicated that it would consider the totality of the circumstances in making a determination of whether Nixon affirmatively and explicitly agreed to counsel's strategy of conceding guilt to the charged crime. The court in its written order noted that one of the factors that needed to be examined was the general pattern of Corin's interactions and communications with Nixon. After reviewing the trial record, Nixon I and Nixon II, the transcript of the evidentiary hearing conducted on December 19, 1988, and Corin's testimony at the May 11, 2001, evidentiary hearing, the trial court found that Nixon's pattern of interactions with counsel involved information being provided by Corin, followed by silence from Nixon. In essence, the trial court found that Nixon's failure to approve or disapprove verbally was approval of counsel's strategy.

In Nixon II, we found that counsel's comments at trial were the functional equivalent of a guilty plea. Since counsel's comments operated as a guilty plea, in order to affirm the trial court's ruling, the record must contain substantial evidence which would enable this Court to determine that Nixon did more than silently submit to counsel's strategy. The only evidence presented at the evidentiary hearing was Corin's testimony, which indicated that Nixon neither agreed nor disagreed with counsel's trial strategy. Thus, there is no competent, substantial evidence which establishes that Nixon affirmatively and explicitly agreed to counsel's strategy. Without a client's

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[8] Corin's testimony essentially mirrored his testimony given at the December 19, 1988, evidentiary hearing, at which Nixon invoked the attorney-client privilege. Thus, both the direct and cross-examination of Corin were extremely limited. Nonetheless, at that hearing Corin testified that Nixon did not affirmatively agree to his concession of guilt. Corin also testified that Nixon did not do or say anything to demonstrate his approval of the trial strategy.

affirmative and explicit consent to a strategy of admitting guilt to the crime charged or a lesser included offense, counsel's duty is to "hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt." Nixon II, 758 So.2d at 625 (emphasis added). Since we held in Nixon II that silent acquiescence to counsel's strategy is not sufficient, we find that Nixon must be given a new trial.

CONCLUSION

Accordingly, for the reasons stated in this opinion in Nixon II, we reverse the trial court's denial of postconviction relief and remand for a new trial. In light of our disposition of Nixon's rule 3.850 appeal, Nixon's habeas corpus petition is dismissed as moot.

It is so ordered.

ANSTEAD, C.J., and PARIENTE, QUINCE, and CANTERO, JJ., concur.
ANSTEAD, C.J., concurs specially with an opinion, in which PARIENTE and QUINCE, JJ., concur.
LEWIS, J., concurs in result only with an opinion.
WELLS, J., dissents with an opinion, in which SHAW, Senior Justice, concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

ANSTEAD, J., specially concurring.

I concur in the majority opinion because it simply reaffirms a fundamental principle long ago established by the United States Supreme Court and consistently adhered to by courts, that counsel cannot enter a plea of guilty to a criminal

indictment without the express consent of the defendant. See Jones v. Barnes, 463 U.S. 745, 751 (1983) ("[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, [such] as . . . whether to plead guilty . . . ."); Boykin v. Alabama, 395 U.S. 238, 242-44 (1969) (recognizing that a defendant's decision to plead guilty involves the simultaneous waiver of several constitutional rights and, hence, waiver must be knowingly and voluntarily made by defendant); Brookhart v. Janis, 384 U.S. 1, 7-8 (1966) (holding that attorney does not have the power to enter a plea of guilty or to admit guilt "in effect" where the defendant has not consented to such a strategy); Sistrunk v. Vaughn, 96 F.3d 666, 670 (3rd Cir. 1996) ("[C]ertain litigation decisions are considered 'fundamental' and are for the client to make. These include decisions on whether to plead guilty, whether to testify, and whether to take an appeal."); Johnson v. Duckworth, 793 F.2d 898, 900 (7th Cir. 1986) ("[T]he decision to plead guilty is one that must be made by the defendant, and is not one in which an attorney may speak for his client without consultation."); Wiley v. Sowders, 647 F.2d 642, 650 (6th Cir 1981) ("Unquestionably, the constitutional right of a criminal defendant to plead 'not guilty,' or perhaps more accurately not to plead guilty, entails the obligation of his attorney to structure the trial of the case around his client's plea."); Childers v. State, 782 So.2d 513, 517 (Fla. 1st DCA 2001) ("It is well established that an attorney may not concede guilt for any crimes to which the defendant had pled 'not guilty' unless the court finds that the defendant understands the consequences of the concession, because it is the functional equivalent of a guilty plea."); Taylor v. State, 695 So.2d 1293, 1295 (Fla 5th DCA 1997) ("While counsel may believe it tactically wise to stipulate to a particular element of a charge or to issues of proof, an attorney may not stipulate to facts which amount to the 'functional equivalent' of a guilty plea without [the defendant's] consent.").

This fundamental principle is so firmly established that we have long ago incorporated it into an explicit and mandatory

rule of criminal procedure. See Fla.R.Crim.P. 3.171(c)(1) ("Defense counsel shall not conclude any plea agreement on behalf of a defendant-client without the client's full and complete consent thereto, being certain that any decision to plead guilty or nolo contendere is made by the defendant."); see also Fed.R.Crim.P. 11 (requiring court to conduct inquiry of defendant wishing to plead guilty on the record to ensure defendant knows consequences of such plea); ABA Standards for Crim. Justice, Std. 4-5.2 (3d ed. 1993) (stating that what pleas to enter and whether to accept a plea are ultimately decisions to be made by the accused after receiving full and careful advice from counsel).

Of course, this fundamental principle applies equally to the most heinous offenses as well as those of a less serious nature. Further, while the delay in the resolution of this case should be cause for concern, it is apparent that a significant portion of that delay has been caused by either the failure to apply this principle at the trial level, or out of concern that the State be given every opportunity to demonstrate that the defendant did agree to allow his counsel to admit his guilt to capital murder. We have explicitly denied the defendant any privilege to prevent his counsel from testifying about the defendant's consent to counsel's admission of guilt to capital murder.

When we previously reviewed this case, Justice Harding wrote an opinion that continues to provide a compelling explanation for our adherence to this fundamental principle:

> Prior to this nation's birth, the colonists were subjected to a system of government that denied individual rights and liberties and failed to provide due process. Based on their experience with the English monarchy and its courts, the founders of this country were determined to ensure that a number of individual rights and

liberties were specifically provided for within the body of the Constitution. Today these rights include the right to have effective assistance of counsel in criminal matters, the right against self-incrimination, the right to an impartial jury, the right to a fair trial, the right to confront one's accusers, the right to be presumed innocence until proven guilty, and the right that the government prove a criminal matter beyond a reasonable doubt. These rights are available to all citizens, regardless of race, creed, or social status. History has shown that it is only when due process is strictly adhered to that judicial outcomes are credible. It has been said a number of times that it is more important that no innocent man be convicted than a guilty man go free. See In re Winship, 397 U.S. 358, 372, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Harlan, Jr., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free."); Furman v. Georgia, 408 U.S. 238, 367 n. 158, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Marshall, J., concurring) ("[I]t is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned.") (quoting William O. Douglas, Foreward to Jerome Frank & Barbara Frank, Not Guilty 11-12 (1957)).

I share and understand the frustration of my colleagues in dissent. This is a difficult case for several reasons, not the least of which is the substantial evidence of the defendant's guilt. I do not question the competence or experience of trial counsel. Neither do I underestimate the frustration counsel may have experienced with such a disruptive and uncooperative client. Nor do I question that the strategy taken by defense

counsel was an effective one reasonably calculated to help the defendant avoid the death penalty. Yet, I cannot accept that substantial evidence of guilt, a disruptive client, and an effective trial strategy can preempt the constitutional right of a defendant to the presumption of innocence and the requirement that a guilty plea be knowingly and intelligently entered. A plea of guilty cannot be entered to a judge or a jury without the defendant's consent. It is not a theoretical gloss or a hypothetical exercise to require that a defendant, no matter how gruesome or horrible his crime, how guilty he is, or how good the trial strategy, be accorded those rights. The courts have consistently required a judge to make inquiry and determine that a guilty plea is voluntarily, intelligently, and freely entered. We have developed a detailed rule setting forth specific procedures that courts must follow in making this determination. See Fla.R.Crim.P. 3.172. My research has not revealed a case where the failure to ensure that a defendant's plea of guilty was voluntary and intelligently entered was error subject to a harmless error analysis.

In the absence of certain knowledge of whether Nixon consented to counsel's strategy, the process for determining guilt or innocence was utterly flawed in this case. If Nixon did not consent, then a number of his constitutional rights were violated: he did not have a fair trial, he did not have effective representation, he was not seen as innocent until proven guilty, and the government was not held to its burden of establishing its case beyond a reasonable doubt. Despite his difficult behavior, Nixon was still

> entitled to his constitutional rights. Without the benefit of these rights, we can place no credence in the jury's verdict of guilt in this case. Any other conclusion would rend the very fabric from which our justice system was woven.

Nixon v. Singletary, 758 So.2d 618, 625-26 (Fla. 2000) (Harding, C.J., concurring).

PARIENTE and QUINCE, JJ., concur.

LEWIS, J., concurring in result only.

In concur in result only because I am compelled to do so solely and exclusively by the doctrine of law of the case. Although the decision and result here are, in my view, both legally and logically incorrect, the "roadmap to reversal" was previously drawn, and the misdirection of the correct applicable legal concepts written in Nixon v. Singletary, 758 So.2d 618 (Fla. 2000), which has become commonly referred to as Nixon II with which I dissented at the time. As unfortunate and convoluted at these legal and factual circumstances may be, I am bound by the prior decision of this Court and will honor its precedent.

In concurring in result only, I do not suggest that this Court has applied the appropriate standards or delivered the correct principles of law in connection with cases involving defendants who have intentionally disrupted the legal process and legal proceedings for their own advantage as has occurred here. I believe the record clearly demonstrates that the defendant here intentionally disrupted his original trial proceedings, effectively blocked a proper and full truth-finding determination of the effective assistance of counsel issue when initially presented to this Court, and has now secured judicial benefits flowing from his disruptive tactics related to the legal

proceedings conducted following the death of the victim in 1984. Almost twenty years after the event, this Court is rewarding an intentionally disruptive defendant and misdirecting a fair and just determination of the issues that should be properly before the court.

I suggest that this Court became misdirected when it held that the present case involved ineffective assistance of counsel per se under the decision of the United States Supreme Court in United States v. Cronic, 466 U.S. 648 (1984), when this Court considered the issue in Nixon II. In my view, this Court had previously considered and rejected such position ten years earlier in 1990 in Nixon v. State, 572 So.2d 1336 (Fla. 1990), when this Court unanimously affirmed Nixon's convictions and sentences. As I read the record in this Court, Nixon asserted on appeal to this Court prior to 1990 that per se ineffective assistance of counsel under Cronic had occurred during the trial proceedings. At that time, this Court remanded the case to the trial court simply for an evidentiary hearing to determine whether Nixon had been informed of the strategy to concede the factual predicate for the case and to center the case upon seeking leniency and preserving the life of the defendant. When the case was remanded at that time, the trial court found and determined:

> 1. Trial Defense Counsel Corin reviewed with capital Defendant/Appellant Nixon, the defense approach to the case in general terms including, but not limited to, the probability that he would concede the killing of the victim by Nixon.
>
> 2. Corin and Nixon had previous attorney-client relationships, both were veterans of the criminal justice system and although Nixon manifested no reaction, he understood what was to take place.

> 3. Nixon made no objection and did not protest the strategy and tactic employed at trial.
>
> Based on the foregoing, this Court concludes that the Defendant/Appellant Nixon has not sustained his burden of proof by the applicable standard that he (a) was neither informed nor knew of the trial strategy and tactic employed by Defense Trial Counsel Corin nor (b) did not consent thereto or (c) acquiesce therein.

State v. Nixon, No. 84-2324-CF, order at 10 (Fla. 2d Cir. Ct. order filed Oct. 3, 1989).

The foregoing findings by the trial judge were entered as the case had been remanded to the trial court for specific findings on the issue. The trial court's order and findings were abundantly clear that Nixon never sustained his burden in connection with the claims of ineffective assistance of counsel based upon allegations that he was neither informed, nor knew of the trial strategy, nor did Nixon carry his burden to demonstrate that he had not consented to the trial strategy employed by this defense counsel. The findings entered before our 1990 opinion are important in consideration of the flow of the present case because in our earlier 1990 opinion, we specifically stated:

> However, the state's examination of Mr. Corin [defense counsel] was extremely limited due to this refusal to testify concerning matters not already addressed during his testimony for the defense absent Nixon's waiver of the attorney-client privilege. Nixon refused to waive the privilege and the State was unable to fully examine Mr. Corin.
>
> We recognize the confusion resulting from our remand for these atypical proceedings and

> decline to dispose of this claim on the present state of the record which we view as less than complete. Accordingly, we do so without prejudice to raise the issue in a later motion to vacate pursuant to Florida Rule of Criminal Procedure 3.850.

Nixon v. State, 572 So.2d at 1340 . It is clear that this Court was concerned at that time that it was not permitted to have access to the full information because Nixon had refused to waive the attorney-client privilege. The Court at that time noted that the record was incomplete due to Nixon's failure to waive the attorney-client privilege.

In my view, this Court in 1990 considered and rejected application of United States v. Cronic and rejected the view that under these circumstances per se ineffective assistance of counsel arose. If Cronic were applicable when presented to this Court in 1990, it would have been unnecessary to conduct further proceedings regarding the interaction between Nixon and his counsel. I suggest that the Court in 1990 understood the record before it and concluded that the record did not establish per se ineffective assistance of counsel as the applicable standard. There would have been no need for further activity had that been the conclusion of this Court at that time. In my view, this Court only permitted Nixon an opportunity to present the issue again in a collateral motion to afford an opportunity to Nixon to establish by additional evidence the elements required by Strickland. When the postconviction collateral motion was filed by Nixon and considered initially, Nixon chose not to present sufficient evidence to afford relief under Strickland, and, in fact, precluded full examination of the issue with regard to counsel's performance by refusing to permit his counsel to testify concerning their conversations. In essence, in the collateral proceeding, this Court in Nixon v. Singletary, 758 So.2d 618 (Fla. 2000), permitted Nixon to assert the issue of ineffective assistance of counsel and then assert an attorney-client privilege

by remanding for consideration of the issue under the standard established in Cronic rather than applying the requirements of Strickland.

My view of the record indicates that Nixon confessed to law enforcement and to members of his family with regard to the facts surrounding the murder of the victim in this case. The evidence indicated that Nixon was competent to participate in the trial proceeding, that he was malingering, and that he was attempting to disrupt the orderly process of the trial court proceedings. Under these circumstances, the majority of this Court in Nixon II, in my view, precluded trial counsel from attempting to save the life of a defendant through a trial strategy that would accept the existence of the overwhelming factual evidence and attempt to center upon preserving the life of the defendant. This Court announced the requirement in Nixon II that before this type of trial strategy or trial tactic may be utilized, the attorney must either first obtain express approval of the trial court after presenting all of the negative factual information to a trial judge who is the final adjudicator as to whether a death penalty will be imposed or obtain the express acceptance of a particular trial strategy by a disruptive defendant who has no intention of ever cooperating so that a trial proceeding could move forward. In my view, this Court reached an impractical result in Nixon II, and such result and the standards expressed therein rendered the proceedings which we now review as perfunctory steps in the process.

My review of this record demonstrates an especially aggravated circumstance where the victim had been kidnapped in her own motor vehicle from a local shopping mall, the victim had been tied between trees with motor vehicle jumper cables and the victim was actually burned alive. Here, Nixon confessed not only to law enforcement in substantial detail, but he also confessed to members of his immediate family who testified about those very confessions during the trial. Three well-respected trial judges have now examined the issue of trial

counsel's effectiveness and the trial strategy utilized, and have made it clear that this defense attorney was approaching this case in the only available and reasonable defense posture possible in attempting to save Mr. Nixon from the death penalty under the facts presented in this case.

In the initial postconviction collateral proceeding, the trial judge entered an exhaustive order detailing the conduct of this capable defense counsel and the very significant actions, including the introduction of some fifty exhibits in support of mitigation and the presentation of at least nine witnesses to provide mitigation evidence directed to the defendant's background, and mental and emotional problems. The trial judges have continuously emphasized the strategic theme and trial tactic that focused upon Nixon's mental and emotional problems and that defense counsel was simply presenting the very best argument and approach to secure a life sentence with the admitted aggravated factors that were presented before the jury.

When the case was before this Court in 2000, the trial judge during the initial postconviction proceeding had expressly addressed and rejected the argument that these circumstances must be controlled by United States v. Cronic, and the trial judge at that time expressly stated:

> (3) In the alternative, Defendant argues that counsel's concession of guilt without an express waiver by Defendant on the record constitutes ineffective assistance of counsel per se under United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Defendant claims that Cronic obviates the necessity of demonstrating prejudice, which is normally required for an ineffective assistance of counsel claim.

In Cronic, the United States Supreme Court held that when surrounding circumstances justify a presumption of ineffectiveness, a Sixth Amendment claim can be sufficient without inquiring into counsel's performance. Such circumstances arise when a Defendant is denied presence of counsel at a critical stage in the prosecution or when there is a breakdown in the adversarial process that would justify a presumption that a Defendant's conviction was reliable. Id. at 2046-2049. Cronic applies to a narrow spectrum of cases where counsel's ineffectiveness was so egregious that the Defendant was in effect denied any meaningful assistance at all. See also, Chadwick v. Green, 740 F.2d 897 (11th Cir. 1984). Apart from circumstances of that magnitude, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermine the reliability of the finding of guilt. Cronic, supra, at 2047 (citing Strickland v. Washington, 466 U.S. at 693-606, 104 S.Ct. At 2067-2069).

As evidenced by the court record cited in the above paragraphs, this case is not one in which the surrounding circumstances justify a presumption of ineffectiveness. There is no allegation that Defendant was denied assistance of counsel in his defense. Cronic, supra, at 2044. Neither the deficiency alleged, nor the record of the trial reveal a breakdown in the adversarial process that would justify a presumption that Defendant's conviction was not sufficiently reliable to satisfy the Constitution. Cronic, supra, at 2049. Because defense counsel's concession of guilt, to try to retain sympathy during the

penalty phase, is an acceptable strategy, Defendant is required to show prejudice. This reasoning is consistent with other courts that have applied the Strickland standard for ineffective assistance of counsel claims, which requires prejudice to similar defense strategies. See Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987). Defense counsel's concession of guilt did not, and could not possibly have prejudiced Defendant in any way. The evidence of guilt was so overwhelming the jury would have found him guilty as charged even without concession. For the same reasons discussed under the Strickland claims, Defendant fails to show that but for counsel's errors the result of the proceeding would have been different.

When this Court in 2000 rejected this reasoning, it failed to accommodate the severe and aggravated factors with which the trial court was faced. The defendant here would not attend trial court proceedings, the defendant had removed his clothing in a holding cell, and the defendant had demanded that a different judge conduct the proceedings and that he be assigned different counsel. I suggest that the record in these proceedings prior to this Court's decision in 2000 reflects that Nixon had continually attempted to disrupt the proceedings in this case. When this Court rendered its decision in 2000 in Nixon II, it demonstrated that Nixon had succeeded in his attempt and that decision was predicated upon all facts which were available to be considered.

In my view, experienced defense counsel, who was doing the very best under the most difficult of circumstances, attempted to save the life of this defendant. The circumstances in this case involved very heinous and aggravated circumstances and the violent and aggravated circumstances were admitted by the defendant to not only law enforcement personnel but also to

members of his family who all testified in detail concerning those confessions. Here, the circumstances, trial strategy, and trial tactics of experienced defense counsel have now been recognized by multiple trial judges as the clearly appropriate and essentially the only defense strategy available under these aggravated facts. This record demonstrates that experienced defense counsel was conscientious and worked diligently in the best interests of his client as he attempted to preserve his life. In my opinion, it is clear that everyone, including Nixon, was aware of the trial strategy but the burden placed upon the proceedings by this Court in Nixon II rendered the present outcome the only possible outcome under the law and standards as stated.

I am extremely concerned that the history in this case may be improperly utilized by individuals in the future and that due to the nature of the restrictions this Court has now placed upon defense counsel, the defense of death penalty defendants will not be performed in the most effective manner possible. I suggest that cases such as this place trial lawyers in the most difficult of situations. When an individual confesses not only to law enforcement but also to members of his or her immediate family with regard to very aggravated and heinous crimes and this Court will not permit a trial attorney to even acknowledge that which has been confessed as true but forces the attorney to engage in full litigation as though the confessions never occurred, lawyers and the judicial system are placed in a precarious position and citizens are legitimately caused to question the veracity of lawyers and judicial proceedings. If I were writing on a clean slate, I would affirm the decision of the trial court here but, unfortunately, Nixon II directs a different result and I am therefore compelled to concur in the result based solely upon the law of the case.

WELLS, J., dissenting.

I dissent because I conclude that this Court's granting to defendant Nixon a new trial is legally wrong and not justified or demonstrated to be required by the majority opinion.

It has now been almost nineteen years since Ms. Bickner was abducted from the Governor's Square Mall in Tallahassee and murdered. This same issue upon which a new trial is now granted by the majority has been framed in this record since Judge Hall made his statement at the close of the trial proceedings in 1985. Clearly, this same issue was in the record when this Court affirmed Nixon's conviction and sentence of death in 1990.

Then, in 2000, if this Court was going to grant a new trial on this issue, the question was expressly before this Court. I wrote at that time:

> I also dissent because I believe the majority's opinion, after more than nine years, creates a new standard for this case. The majority opinion states at page 624 (slip opinion): "[W]e conclude that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough." Is this to be "established" by a preponderance of the evidence - clear and convincing evidence - or to the exclusion of every reasonable doubt? Is a nod of the head sufficient, or does the majority actually require a [Boykin v. Alabama, 395 U.S. 238 (1969)] on-the-record acceptance to have been made? It appears to me that the majority is here dictating a new trial, only leaving to the trial judge the actual ordering of it.

This appears to me to dictate a new trial because the record has been clear for the fifteen years since this trial that during the trial Nixon set about not to "explicitly accept" anything. This was part and parcel of his disruptive and noncooperative conduct. If "explicit acceptance" per Boykin is the requirement, this Court should have so stated in 1990. If that had been correctly the issue then, this Court's majority at that time would have reversed for a new trial based on the record, which does not have a Boykin on-the-record "explicit acceptance." However, the then unanimous majority did not do that. The present new majority confuses our procedure when it in actuality rehears and sets aside that decision. I conclude that it is harmful to the processing of capital cases generally when the majority of this Court erodes the distinction between direct appeal and postconviction relief for a particular case, as is being done here.

Nixon v. Singletary, 758 So.2d 618, 634 (Fla. 2000) (Wells, J., dissenting). But this Court did not order a new trial but remanded this case for an evidentiary hearing in the circuit court.

Upon that remand, Judge Janet Ferris held the hearing ordered by this Court's majority. Judge Ferris thereafter, in an exceptionally thorough and thoughtful order, came to the conclusion that the postconviction motion should be denied. In pertinent part, Judge Ferris' order states:

> Issues now before this court for resolution involve legal challenges initially raised in Defendant Joe Elton Nixon's direct appeal from his conviction and sentence of death for the murder of Jeanne Bickner. Ms. Bickner was murdered on August 12, 1984. Joe Elton Nixon's

trial for that murder took place in July of 1985, and his conviction was appealed to the Florida Supreme Court. In the direct appeal, the Court was asked to address Mr. Nixon's claim that he was denied effective assistance of counsel at the guilt phase of his trial when his attorney, Assistant Public Defender Michael Corin, conceded guilt and sought leniency regarding Mr. Nixon's punishment. To fully explore that issue, the Florida Supreme Court temporarily relinquished jurisdiction to the trial court in October of 1987 to "determine whether Nixon was informed of the strategy to concede guilt and seek leniency." Nixon v. State, 572 So.2d 1336, 1339 (Fla. 1990).

Due to some confusion about the procedure to be followed at the evidentiary hearing, a second order was issued by the Supreme Court on October 4, 1988, to outline which witnesses would be permitted to testify and limitations on their cross-examination. Continuing confusion about the scope of the hearing and the trial court's responsibilities at that hearing resulted in another clarifying order on February 1, 1989. At the August 30, 1989, hearing that finally attempted to resolve the ineffective assistance issue, Mr. Nixon declined to waive the attorney-client privilege, which effectively precluded Mr. Corin from discussing his communications with Mr. Nixon. The Supreme Court found the record of those proceedings "less than complete," and ultimately declined to dispose of the claim, inviting the defendant to revisit the matter in a post-conviction motion brought pursuant to Florida Rule of Criminal Procedure 3.850. Nixon, at 1339-1340.

Mr. Nixon filed his 3.850 motion on October 7, 1993. In 1997, the trial court denied the motion without an evidentiary hearing. Included in that order was the summary denial of several claims asserting that Mr. Nixon's trial counsel was ineffective, including the specific claim that Mr. Corin's concession of guilt without an express waiver by Defendant on the record constituted per se ineffective assistance of counsel under United States v. Cronic, 466 U.S. 648 (1984). The trial court disposed of Mr. Nixon's Cronic claim by finding that ". . . his case is not one in which the surrounding circumstances justify a presumption of ineffectiveness. . . . Neither the deficiency alleged, nor the record of the trial reveal a breakdown in the adversarial process that would justify a presumption that Defendant's conviction was not sufficiently reliable to satisfy the Constitution (citation omitted)." That order was appealed to the Florida Supreme Court, resulting in Nixon v. Singletary, 758 So.2d 618 (Fla. 2000), the decision which has again remanded Mr. Nixon's case to the trial court for a limited evidentiary hearing.

In Nixon v. Singletary, the Supreme Court considered both the trial court's summary denial of Mr. Nixon's 3.850 post-conviction motion and his petition for writ of habeas corpus. In deciding to remand the case to the circuit court for an evidentiary hearing, the Court concluded that the ". . . resolution of one issue . . . [is] dispositive in this case: whether Nixon's trial counsel was ineffective during the guilt phase of the trial." Nixon v. Singletary at 620. Although numerous ineffectiveness claims were raised in Mr. Nixon's 3.850 motion, the Court's decision focused on

Nixon's charge that his attorney's concession of guilt in opening statement was ". . . the equivalent of a guilty plea by his attorney." Nixon v. Singletary at 620. Mr. Nixon's further claim that he did not give his attorney consent to enter a guilty plea and did not consent to a trial strategy in which guilt would be admitted was a compelling issue for the Court. In a lengthy opinion, the Court concluded that Mr. Corin's statements to the jury were the "functional equivalent of a guilty plea." Nixon v. Singletary at 624.

Reasoning further that due process requires ". . . a court accepting a guilty plea to carefully inquire into a defendant's understanding of the plea so that the record contains an affirmative showing that the plea was intelligent and voluntary . . . ," the Court indicated that Mr. Nixon's "consent to this trial counsel to concede guilt" would apparently substitute for the lack of an inquiry and finding by the trial court that the "plea" was intelligent and voluntary. As further direction to this court regarding the evidentiary hearing, the Supreme Court observed that ". . . Nixon's claim must prevail at the evidentiary hearing below if the testimony established that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough." Nixon v. Singletary at 624. The Supreme Court found that the need for affirmative, explicit acceptance of this trial strategy emanates from the principle that ". . . the defendant, not the attorney, is the captain of the ship. . . . Although the attorney can make some tactical decisions, the ultimate choice as to which direction to sail is left up to the defendant. The

question is not whether the route taken was correct; rather the question is whether Nixon approved of the course." Nixon v. Singletary at 625.

The Supreme Court's remand appears limited to one issue: did Joe Elton Nixon give his attorney, Mike Corin, consent to concede guilt at trial, and was that consent supported or evidenced by an "affirmative, explicit acceptance by Nixon" of this specific aspect of the trial strategy? One might suspect that such a question could be answered quickly and easily following a brief hearing. Unfortunately, that is not the case. Not only has there been disagreement about the status of Mr. Nixon's other post-conviction claims, but there is continuing dispute about the appropriate legal standard to be employed in resolving claims such as this. The State has forcefully argued that the Florida Supreme Court's understanding of United States v. Cronic, supra, is flawed, and that recent federal court decisions interpreting Cronic have explicitly rejected the Supreme Court's analysis of the issue. The State argues here, as it has recently in the United States Supreme Court, that the Florida Supreme Court's interpretation of Cronic is "overly expansive" and is contrary to the holding of the seminal post-conviction case of Strickland v. Washington, supra. Although compelling arguments, this court cannot agree that it is a liberty to revisit the legal basis for the remand in Nixon v. Singletary, supra. Other opportunities exist for the State to present its argument for resolution by the Florida Supreme Court and the United States Supreme Court.

It is obvious, however, that the Florida Supreme Court's opinion presents this court with a dilemma. Ordinarily, those matters deemed inappropriate for summary resolution of 3.850 post-conviction claims are returned to the trial court intact for an evidentiary hearing, and the resolution of the motion is based on application of the law to the facts determined at the hearing. In Nixon v. Singletary, the Supreme Court not only resolved the legal issues, but also circumscribed the type of evidence and the manner in which it could be considered by the trial court in addressing Mr. Nixon's claim. The most obvious concern faced by this court is how to balance the Supreme Court's direction to not only determine whether Mr. Nixon gave his consent to Mr. Corin's strategy of concession of guilt, but to do so only in the context of an "affirmative, explicit acceptance by Nixon" of that strategy. Ordinarily, the trial court may consider many factors in resolving issues of knowing and voluntary waivers of rights, and this case should be no exception. The court must also note that the burden of advancing his claim rests with Mr. Nixon, not the State, but the language of Nixon v. Singletary, suggests a shifting of that burden. The court can only conclude that such a shift was not intended, and that the burden of proof still rests with Mr. Nixon to show that he did not consent to the strategy affirmatively and explicitly.

At the evidentiary hearing held on May 11, 2001, Mr. Nixon did not testify, although he was present in the courtroom. Instead, counsel for Mr. Nixon called Mr. Corin to the witness stand, presumably to show that Mr. Nixon did not

consent. Mr. Corin was candid and forthright in his testimony, and struggled to recall the details of an attorney-client relationship that was forged seventeen years ago. The details of that relationship are complicated by Mr. Nixon himself, a rather intractable client charged with an especially horrible and notorious crime. The record of the guilt and penalty phases of his trial demonstrate that Mr. Nixon had mental health problems dating back to a very young age. Mental health professionals who examined Mr. Nixon prior to trial specifically noted that although Mr. Nixon was competent to stand trial and "technically" capable of cooperating with his attorney, ". . . his lifelong history of lying and creating fantasy situations and blaming others for his troubles . . . [will make it] extremely difficult to get his full cooperation. . ."

That difficulty was evident a trial when Mr. Nixon removed his clothing in the holding cell during jury selection in an express demonstration of his refusal to attend the trial; he had previously refused to attend pretrial motions on July 8 and 9, 1985, forcing Mr. Corin to waive his presence at those hearings. Nixon v. State, at 1341. Without much elaboration, he insisted on being returned to the jail, wanted a new attorney, demanded a black judge, and threatened to disrupt the trial if he was forced into the courtroom. Nixon v. State, at 1341. During his conversation with Judge Hall in the holding cell, Mr. Nixon rarely answered the question posed to him, and at one point flatly refused to answer any more questions. The colloquy between Mr. Nixon and Judge Hall shows that Mr. Nixon was generally unresponsive to Judge Hall's patient inquiries, and consciously

evaded answering the judge's questions regarding his refusal to enter the courtroom. The Supreme Court accepted Judge Hall's finding that Mr. Nixon's extraordinary behavior constituted a knowing, intelligent, and voluntary waiver of his attendance at the trial. That waiver, however, was based on the judge's finding that if Mr. Nixon failed to return to the courtroom after the recess, he would be consenting to proceeding without him. Id.

This court concurs in Judge Hall's conclusion that Mr. Nixon knowingly, intelligently, and voluntarily waived his attendance at the trial. However, it must be noted that the record does not reflect what would ordinarily be considered an affirmative, explicit waiver by Mr. Nixon of his right to be present at trial; instead, Judge Hall made his decision based on the circumstances as they existed at the time, Mr. Nixon's unusual behavior, and his exasperating conversation with Mr. Nixon. It is therefore obvious that the decision regarding whether Mr. Nixon consented to Mr. Corin's trial strategy can be made only after careful consideration of similar factors.

One of those factors must be the general patterns of Mr. Corin's interactions and communications with Mr. Nixon. By 1984, when he undertook representation of Mr. Nixon in this case, Mr. Corin was an experienced trial attorney, and had also handled capital criminal appeals as an Assistant Attorney General and an Assistant Public Defender. Mr. Corin's experienced with capital cases included attending and lecturing at a course designed exclusively for attorneys involved in capital cases. It is also of some note

that Mr. Corin had represented Mr. Nixon in at least one other felony case prior to him being charged with first degree murder. The record clearly reflects that Mr. Corin conscientiously prepared the case for trial, and met numerous times with Mr. Nixon to discuss various trial strategies, the defenses that might apply in the case, and witnesses.

Mr. Corin indicated that his relationship with Mr. Nixon was generally positive, and that they got along "fine." Despite an apparent lack of rancor or hostility in their attorney-client relationship, Mr. Corin noted that Mr. Nixon was not especially communicative, and often did not respond at all in discussions about the case. Testimony from Mr. Corin about Mr. Nixon's reaction to discussions about trial strategy, and in particular about conceding guilt, was especially compelling; Mr. Corin observed that although he discussed these matters with Mr. Nixon on several occasions, Mr. Nixon "did nothing." More importantly, Mr. Corin stated unequivocally that he would not have pursued the strategy of conceding guilt if Mr. Nixon had objected. The only conclusion that can be reached from this uncontroverted testimony is that the pattern of interactions in the attorney-client relationship between Mr. Corin and Mr. Nixon often involved information being provided by Mr. Corin, followed by silence from Mr. Nixon. Whether that pattern of interaction was constructive or helpful is not the issue; rather, Mr. Corin appears to have done all he could to carefully prepare the case for trial, consider the viability of various defenses, inform Mr. Nixon of what was happening with his case, and finally,

tell his client what strategies he intended to pursue. It makes little sense to assume that a lawyer would encourage of prefer such stony silence from his or her client; there can be no doubt that active participation by the client in their defense is far more productive. It is also clear that when a client is a highly educated, intelligent, and articulate individual with no mental health problems, the patterns of communication between lawyer and client will be quite different from what usually transpired between Mr. Corin and Mr. Nixon. Mr. Corin did the best he could with a difficult case and a difficult client.

In resolving post-conviction claims, defendants urge trial courts to revisit each and every decision made by an attorney before, during and after a trial. Increasing numbers of motions to withdraw pleas are filed, and post-conviction motions asserting misadvice of counsel leading up to entry of a plea have flooded the trial courts. At their core are various assumptions about a criminal defendant's "right" to perfection in his or her representation. As the State noted in its Memorandum, everyone involved in the court process must possess a ". . . true understanding of the realities of representing criminal defendants." Mr. Corin perhaps stated the obvious when he testified that representing criminal defendants is a "pretty tough job" because some clients are helpful and others are not. He patiently pointed out that as a defense attorney ". . . you hope that you have clients that are cooperative"; when clients are not, "you do the best you can . . . [and] represent them to the best of your ability." In response to a question from Assistant State

Attorney Eddie Evans, Mr. Corin responded as follows: "But you've never been a criminal defense lawyer. So you don't really understand exactly how it is when you represent human beings in cases. And it is just not black and white, but and dry. There are many times lawyers make decisions because they have to make them because the client does nothing." Mr. Corin's response was: "Yes, sir."

Mr. Corin's statements are compelling. The record of Mr. Nixon's trial provides ample evidence of what Mr. Corin faced in his interactions and communications with Mr. Nixon. It is hard to imagine a more onerous situation than a client charged with first degree murder absenting himself from the trial; here, in addition to a confession and overwhelming evidence, Mr. Corin had to contend with the prejudice Mr. Nixon would surely create by not being present in the courtroom during the trial. Did Mr. Nixon discuss with Mr. Corin his decision to take off his clothing and refuse to enter the courtroom? Should there have been an inquiry about whether this was Mr. Nixon's execution of an agreed-upon trial strategy, and whether he consulted with his attorney about it? It is evident Mr. Nixon made his position known through bizarre behavior and angry statements, and not by an affirmative or explicit discussion of his decision with trial counsel or the court. It is likewise impossible to resolve the Supreme Court's question by reliance on an unrealistic construct. Mr. Corin's conduct as an attorney in this case must be evaluated by the objective standards described in the case law articulated by the United States Supreme Court, the Florida

Supreme Court, and our District Courts of Appeal. That objective standard also must be applied to the facts and circumstances of this case, without resort to unfair presumptions about what should have occurred.

Relying on the trial court, the two reported decisions of the Florida Supreme Court addressing Mr. Nixon's case, and the evidentiary hearings conducted on December 19, 1988 and May 11, 2001, this court finds that Mr. Nixon did consent to the trial strategy of conceding guilt. His consent occurred as a part of his natural pattern of communication with Mr. Corin, wherein Mr. Corin would discuss these matters with Mr. Nixon, and Mr. Nixon would refuse to respond. The court further finds that the fact that Mr. Nixon did not provide counsel with an affirmative, explicit consent in words, and in the manner that we ordinarily expect and presume is acceptable, does not mean that it was not given. Looking to Mr. Nixon's manner of communicating with counsel and with the court during his jury trial alone, it is obvious that Mr. Nixon is often more comfortable communicating through his behavior, rather than the spoken word. The lack of words cannot, and did not, render his communication any less clear or explicit. Were we now to craft a legal standard requiring articulation for every knowing and voluntary waiver of rights, where other evidence exists to support the conclusion that a knowing and voluntary waiver occurred, we will create a standard that is impossible to meet. We may also encourage the creation of situations that will be impossible to resolve: if, after jeopardy attaches in a jury trial, the defendant merely refuses to

> answer a judge's questions about his or her presence at the trial, agreement with trial strategies such as conceding guilt on some charges but not others, or testifying at trial, what is the appropriate resolution of such an obvious stalemate? Trial courts must be given the opportunity to resolve such matters based upon the facts, rather than the existence or non-existence of certain words. In the case at bar, Mr. Nixon's actions speak clearly. We cannot now search for words that he was clearly disinclined to provide.

State v. Nixon, No. R84-2324AF, order at 1-14 (Fla. 2d Cir. Ct. order filed Sept. 20, 2001) (record references omitted). Judge Ferris did what this Court's majority ordered. She held an evidentiary hearing and reached a factual conclusion. Now this court rejects Judge Ferris's conclusion and grants a new trial. I agree with Judge Ferris.

SHAW, Senior Justice, concurs.

Three Cases Consolidated:

Two Appeals from the Circuit Court in and for Leon County,

L. Ralph Smith, Jr., Judge - Case No. 84-2324

and An Original Proceeding - Habeas Corpus

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Supreme Court of Florida

WEDNESDAY, OCTOBER 1, 2003

CASE NOS.: SC01-2486; 92006;
SC93192
Lower Tribunal No.: 84-2324-CF

JOE ELTON NIXON vs. STATE OF FLORIDA
JOE ELTON NIXON vs. JAMES V. CROSBY, JR., ETC.

Appellant/Petitioner Appellee/Respondent

Appellee/Respondent's Motion for Rehearing is hereby denied.

ANSTEAD, C.J., PARIENTE, LEWIS, QUINCE and CANTERO, JJ., concur.
WELLS and SHAW, Senior Justice, dissent.

A True Copy
Test:

_____
Thomas D. Hall
Clerk, Supreme Court

tc
Served:

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HON. JANET E. FERRIS, JUDGE

Supreme Court, U.S.
FILED
MAY 14 2004
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Case No. 03-931

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA, *Petitioner*,

v.

JOE ELTON NIXON, *Respondent.*

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the Florida Supreme Court apply an incorrect standard, contrary to Strickland v. Washington, 466 U.S. 668 (1984), Bell v. Cone, 535 U.S. 685 (2002), and Roe v. Flores-Ortega, 120 S.Ct. 1029 (2000), by finding defense counsel ineffective *per se* under United States v. Cronic, 466 U.S. 648 (1984), despite having found counsel's strategy not to contest overwhelming evidence of guilt but to vigorously contest the sentence to be in the defendant's best interest and reasonably calculated to avoid a death sentence?

2. Did the Florida Supreme Court err in concluding that Boykin v. Alabama, 395 U.S. 238 (1969), prohibited trial counsel from adopting a strategy, after fully informing Nixon, who acquiesced to the strategy, not to contest overwhelming guilt to protect the best interest of Nixon and more effectively contest the appropriateness of imposing the death penalty?

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ARGUMENT

THE FLORIDA SUPREME COURT ERRED IN CONCLUDING THAT NIXON'S TRIAL COUNSEL WAS INEFFECTIVE *PER SE* IN PURSUING AN EFFECTIVE STRATEGY ACQUIESCED TO BY NIXON AND

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I

Corin's trial performance should be reviewed under Strickland; Cronic's presumption of prejudice cannot apply when counsel has investigated the case and has made a strategic decision designed to benefit the defendant; here, Corin's guilt-phase concessions were reasonable trial strategy that cannot be deemed a "total" failure to act as an advocate on Nixon's behalf. 19-23

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Case No. 03-931

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,

Petitioner,

v.

JOE ELTON NIXON,

Respondent.

OPINION BELOW

The opinion below is reported as Nixon v. State, 857 So.2d 172 (Fla. 2003) (hereafter, Nixon III), and is published in the Appendix at pp. 526-62.[1]

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[1] Nixon I is the decision of the Florida Supreme Court affirming Respondent's conviction and sentence on direct appeal, reported at Nixon v. State, 572 So.2d 1336 (Fla. 1990), and published in the Appendix at pp. 358-77. Nixon II is the decision of the Florida Supreme Court remanding for evidentiary hearing to determine whether Respondent had expressly agreed to trial counsel's strategy, reported at Nixon v. State, 758 So.2d 618 (Fla. 2000), and published in the Appendix at pp. 393-427. Nixon III is the decision of the Florida Supreme Court following the Nixon II remand.

JURISDICTION

The decision below, resolving Respondent's federal claim that he was denied the effective assistance of counsel at his original trial, was entered on July 10, 2003. On October 1, 2003, the Florida Supreme Court denied the State's Motion for Rehearing (App. 563). Jurisdiction of this Court is timely invoked pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner contends that the following amendments to the United States Constitution are involved:

The Sixth Amendment of the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The Sixth Amendment is applicable to the States through the Fourteenth Amendment of the United States Constitution which provides in pertinent part:

> Section 1. No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent Joe Elton Nixon was convicted of first-degree murder, kidnapping, robbery and arson, and sentenced to death on the first-degree murder conviction. The record shows that Nixon kidnapped the victim, Jeanne Bickner, from the Governor's Square Mall in Tallahassee, Florida, took her in her own car to a wooded area several miles outside Tallahassee, tied her to a tree using jumper cables, and set her on fire (while she was still alive), burning away most of her left leg and arm, and almost all of her hair and skin.

The State presented extensive evidence of Nixon's guilt. Eyewitness testimony established that Nixon approached the victim in the mall parking lot shortly after lunchtime on Sunday, August 12, 1984, and that she opened the trunk of her orange MG sports car and gave Nixon a pair of jumper cables (TR 1860-63, 1865, 1868-69, 1871-73).[2] Later that day, Nixon was seen driving an orange MG around Tallahassee, alone (TR 1879, 1881, 1883-84, 1977-80, 1982-83). He drove the car 15 miles to Havana, where he showed his sister and uncle two rings later identified as belonging to the victim (TR 1959-60, 1968).

He pawned the victim's two rings, and made various attempts to sell the MG (TR 561-63, 2067, 2071-72, 2083-85). Nixon told his brother and Wanda Robinson he had killed a woman, and showed them the MG, the two rings, and a gas ticket with the victim's name on it (TR 2057-58, 2065). Nixon described how he had met the victim at the mall, asked for a "boost," forced her in the trunk of her car, took her down a "pipeline" road and into the woods, used jumper cables to tie her up, and set her on fire after rejecting her offer to write him a personal check in exchange for her

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[2] In this brief, such portions of the record not reproduced in the Joint Appendix will be cited as follows: the original trial record will be cited as "TR"; the Nixon II postconviction record is "PCR."

life (TR 2059-60, 2066-67). Nixon predicted he would "get the electric chair" (TR 2065).

The victim's body was discovered Monday afternoon (TR 1885-87). Early the next morning, Nixon told his brother and Wanda Robinson he was going to burn the victim's car (TR 2061, 2062-68). The MG was discovered, on fire, at 7:35 a.m. Tuesday morning (TR 2002-03), and Nixon's fingerprints were retrieved from various locations on the car (TR 2041-44). The missing keys and gas cap were recovered when, after his arrest late Tuesday morning, Nixon told police where they could be found (TR 946, 957, 967, 1926, 2015-16, 2043-44).[3]

Nixon gave a lengthy and detailed statement to the police.[4] In his statement he admitted the victim begged him not to kill her; however, he put a cloth bag over her head, and tied her to a tree with jumper cables. Nixon set fire to her purse and the contents of the trunk and glove compartment of her MG. As the fire burned, Nixon choked her and then threw a burning item from the car on her head. He returned to the mall that evening with "Tiny" Harris, to retrieve his uncle's car. Nixon told police he burned the MG Tuesday morning after reading in the newspaper that the victim's body had been found. (PCR 915-65).

Nixon called his uncle James Nixon from jail, telling him, "I've done something real terrible. . . . I murdered a lady" (TR 1970-71).

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[3] Nixon had a flat tire Monday evening at a convenience store. (TR 1962-64). A piece of tire tread at the convenience store was later fracture-matched to the damaged tire found by police in the MG's trunk (TR 2033-25).

[4] The record reflects that Nixon was properly advised of his rights, and knowingly, intelligently and voluntarily spoke to police (PCR 915-16, 964-65).

Pretrial

Nixon was indicted August 29, 1984 (TR 1-3). Attorney Michael Corin filed a written plea of not guilty[5] and an initial demand for discovery on Nixon's behalf, and conducted extensive discovery (App. 2-3).[6] Corin did not challenge Nixon's competence to stand trial because, upon expert finding and judicial determination, Nixon had been found competent in another case several weeks earlier. However, Corin did successfully move for the appointment of two mental health experts for use in mitigation (TR 90-93, 899-900, 909-10).[7]

Corin discussed a plea of guilty in exchange for a life sentence with the prosecutor, who rejected it due to the overwhelming evidence of guilt and the severity of the crime (App. 336-39). Corin saw "no benefit . . . at all" to entering a plea of guilty without a recommendation of life (App. 505). However, in Corin's judgment, contesting the State's overwhelming evidence of guilt would damage the credibility of otherwise plausible arguments he could make at the penalty phase for a life sentence. Believing as he did, he decided as a matter of strategy not to contest

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[5] The record does not contain the written plea of not guilty; however, Corin testified that he "probably" filed the plea "as a matter of course," without any expressed direction from Nixon (App. 468-69).

[6] Corin deposed 52 State witnesses, including Nixon's brother and girlfriend, two uncles, numerous police officers and various eyewitnesses to Nixon's possession of the victim's car and other property (App. 53-8). In the defense discovery responses, Corin provided to the State the names of 60 potential defense witnesses (App. 22-32, 34-5) and a list of 49 defense exhibits (App. 47-52). Corin's file in this case contains some 59 pages of handwritten notes of witness interviews, approximately 70 pages of "trial" notes, and a similar number of pages of "trial and deposition notes" (App. 470).

[7] The written reports of these experts, Dr. Doerman (a psychologist) and Dr. Ekwall (a psychiatrist), are reproduced in the Appendix at pp. 59-66 and 67-70.

the State's evidence at the guilt phase, but to contest the sentence vigorously (App. 457-59, 471-72). Corin testified post trial that his strategic decision was not one he would have made "lightly" or without first discussing it with Nixon (App. 472). Nixon never affirmatively stated that he wanted a trial (App. 478), and never objected to Corin's proposed concession-of-guilt strategy; had he objected, Corin would not have pursued that strategy (App. 477).

Trial-Guilt Phase

Jury selection took three days (TR 1059-1257, 1261-1407, 304-436, 441-538, 1411-1606, 1610-1817). The guilt phase portion of the trial took another three days (TR 1825-2024, 2029-2092, 544-707). Nixon chose to absent himself from most of the trial.[8]

Corin told the jury in his opening statement that the real issue in this case was going to be sentencing; the State, he

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[8] Nixon was present in court the first day of jury voir dire, but disrobed to his underwear and refused to leave his holding cell the second day (TR 304, 344). The trial judge, noting that Nixon's behavior had been "volatile" - one day behaving himself, and the next being highly disruptive (TR 306) - examined Nixon in his holding cell. Nixon demanded a black judge and a black attorney; somewhat contrarily, he stated that he cared nothing about the case and never did (TR 335, 337). A bailiff testified that Nixon had threatened to "act up" if forced to attend his trial (TR 343). After lunch, Nixon was again asked by a bailiff if he was "going to court"; Nixon answered that he was "not going up there for them to railroad me" (TR 355). Nixon was present in the courthouse on the first day of trial, but, after talking to Corin, decided to return to jail (TR 1990), and thus was not present in the courtroom during opening statements or any portion of the first day of trial. He chose to attend trial on the second day, and was identified by a witness as the person who had tried to sell the witness the victim's MG (TR 562). Following a recess thereafter, Nixon decided not to return to court (TR 574). The trial court's determination that Nixon's absences were voluntary was upheld on direct appeal. Nixon I (App. 366-68). It bears noting that Nixon did not state at the time of the trial, and has not testified since, that he absented himself as the result of, or as a means of protesting, his trial counsel's concession strategy.

acknowledged, would be able to prove that Nixon had caused the victim's death, but following the trial would be a penalty phase where the jurors would "learn many facts about Joe Elton Nixon" and, after they heard all the evidence, they would know the "reasons" why "his life should be spared." (App. 71-2).

In his closing argument, Corin told the jury:

> Ladies and gentlemen of the jury, I wish I could stand before you and argue that what happened wasn't caused by Mr. Nixon, but we all know better. For several very obvious and apparent reasons, you have been and will continue to be involved in a very uniquely tragic case.
>
> In just a little while Judge Hall will give you some verdict forms that have been prepared. He'll give you some instructions on how to deliberate this case. After you've gotten those forms and you've elected your foreperson and you've done what you must do, you will sign those forms. I know you are not going to take this duty lightly, and I know what you will decide will be unanimous.
>
> I think that what you will decide is that the State of Florida . . . has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged: first-degree premeditated murder, kidnapping, robbery, and arson.
>
> Once you have arrived at those verdicts, there will by [your] decision be caused a second part of this trial. That's something that we had

discussed with you earlier prior to taking your oaths as jurors.

At that time, you indicated that regardless of your own personal beliefs in the death penalty, you would listen to the evidence. You would listen to the Judge's instructions. You would weigh that evidence in arriving at an advisory recommendation of [sic] Judge Hall.

After today is over, we start the second part of this trial. The evidence and testimony that you've seen and heard will also become part of your deliberations at that point as well as other evidence that the State may introduce or I may introduce in Mr. Nixon's behalf.

After you have heard all that evidence, the testimony, [the prosecution] and myself will be able to present additional arguments to you, and Judge Hall will give you instructions to guide your deliberations.

It will be at that point as difficult as it may seem at this point. I will hope to be able to argue to you and give you reasons not that Mr. Nixon's life be spared one final and terminal confinement forever, but that he not be sentenced to die. Thank you.

(App. 73-4).

In closing, the State acknowledged that, notwithstanding any concessions by defense counsel, the burden remained on the State to prove its case to the satisfaction of the jury and beyond any reasonable doubt; what a lawyer says, the State reminded the jury, is not evidence and has no "legal affect" (App. 76-91).

On rebuttal, Corin again reminded the jurors that he planned to give them reasons why Nixon should not be sentenced to death, and emphasized that the trial was "not over until it's over, and it's not near over yet" (App. 92-94).

The trial court instructed the jury, *inter alia*, that the State bore the burden of proof beyond a reasonable doubt (App. 95-98). The jury found Nixon guilty on all counts.

Trial-Penalty Phase

In his opening statement, Corin told the jury it would be obvious that Nixon was "not normal organically, intellectually, emotionally or educationally or in any other way"; based upon the testimony and documents the defense would present, it would be obvious that Nixon had "never been normal or right," and that the jury should recommend a life sentence (App. 102).

The State's evidence at the penalty phase was limited to judgments of conviction for two prior violent felonies (App. 103), and testimony (admitted over Corin's objection) that Nixon had admitted removing the victim's underwear to terrorize her (App. 104-07).

Corin presented testimony from eight witnesses, including friends and family, police officers, and two mental health experts (a psychologist and a psychiatrist). Nixon's mother testified that she loved her son, but he needed help; he had mental and emotional problems (App. 108-11). Wanda Robinson testified that Nixon had been acting strangely at the time of the murder (App.114-18). Police officers testified that, on the night before Nixon had murdered Jeanne Bickner, he had been arrested for battery on Ms. Robinson, but released (App. 122-138). Defense psychiatrist Dr. Ekwall testified that, although Nixon was not psychotic, he did have psychotic episodes, especially when intoxicated (App. 144-45). In his opinion, "something [was] wrong" with Nixon, and the

two statutory mental mitigators applied (App. 143-47).[9] Defense psychologist Dr. Doerman testified that Nixon's intelligence was "borderline" and that he had "some" brain damage, which he described as "spotty" and "diffuse" (App. 159-63). Dr. Doerman agreed with Dr. Ekwall that Nixon could break down under stress, and that the two Florida statutory mental mitigators applied (App. 163-65). Dr. Doerman testified that Nixon functioned relatively well in a structured environment such as prison; he did not think that death was an appropriate sentence for Nixon because he was not "an intact human being" (App. 171, 174).

Corin additionally introduced more than 40 defense exhibits, including school and institutional records and psychological reports dating back to 1972, describing, *inter alia*, Nixon's ongoing behavioral problems and his "seriously disturbed" perception of reality.

In closing argument, Corin identified the mitigating circumstances he deemed established - Nixon's low intelligence, his brain damage, his troubles in school, his age, and his emotional disturbance and impaired capacity at the time of the murder (App. 196-98). He reminded the jury of Nixon's cooperation with police following his arrest, of testimony that Nixon had been a "wild man" when he committed the murder, and of testimony that Nixon had fallen through "cracks" in the system (App. 198-202). Corin noted that, while Nixon obviously had difficulty living on his own, the evidence showed that he functioned well in the structured environment of prison; thus, a death sentence was not necessary to protect society (App. 206-08). Reminding the jury of the psychiatrist's testimony, Corin argued that the death penalty might be appropriate for an "intact human being," but Nixon was not,

[9] See Fla. Stat. Section 921.141 (6) (b) ("The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance."), and (f) ("The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of the law was substantially impaired.").

never had been, and never would be an intact human being." (App. 209). He concluded by saying (App 209):

> You know, we're not around here all that long. And it's rare when we have the opportunity to give or take life. And you have that opportunity to give life. And I'm going to ask you to do that. Thank you.

Direct Appeal

On direct appeal, Nixon complained for the first time about Corin's trial strategy to concede Nixon's guilt and seek leniency at the penalty phase, arguing that Corin's statements were the functional equivalent of a guilty plea, requiring an on-record inquiry to determine if Nixon knowingly, voluntarily and intelligently consented to the defense strategy. Nixon I (App. 361). The Florida Supreme Court remanded to the trial court for a hearing on this issue. Nixon I (App. 363).

On remand, Corin testified that he had graduated from Florida State University law school in 1970; he had been an assistant state attorney general, an assistant federal public defender, and (since 1979) an assistant state public defender (App. 244-46). He had handled a number of capital appeals, had lectured at capital seminars, and had testified as a defense expert witness on claims of ineffectiveness of counsel (App. 246-50). Corin testified that he had discussed the "very, very strong" evidence with Nixon and had explained to him that, should the State reject his plea offer, Corin's goal would be to save Nixon's life rather than to obtain an acquittal, and he would probably concede his guilt (App. 235-37, 253-54). Corin testified that Nixon did not expressly approve of this strategy (App. 238), but he was "aware" of the proposed strategy (App. 239), and was given "the opportunity to express his displeasure or unhappiness" with that strategy, and said nothing (App. 238, 255). Nixon never told him "not to do that" (App. 256).

The lead trial prosecutor testified that Corin's guilt-phase strategy forced the State to be cautious; the State still had to prove its case, but also had to avoid being perceived by the jury as "engaging in overkill" (App. 339-40).

A board-certified criminal defense lawyer, called by the State, testified that, "quite frankly, I don't think that there was a better strategy that could have been employed in the defense of this case than the one that Mr. Corin employed" (App. 355-56).

The trial court denied relief, finding that defense counsel had reviewed the strategy with Nixon, that although Nixon manifested no reaction to the strategy, he understood the strategy, and that Nixon had not protested or objected to the strategy. (App. 364, fn.1).

The Florida Supreme Court affirmed Nixon's conviction and sentence on direct appeal, without deciding his claim that trial counsel was ineffective. Nixon v. State, 572 So.2d 1336 (Fla. 1990) (Nixon I) (App. 358-77).[10]

Postconviction

On October 7, 1993, Nixon filed a motion for postconviction relief alleging, *inter alia*, ineffective assistance of counsel in conceding guilt. The state trial court summarily denied Nixon's motion, rejecting Nixon's claim that "trial counsel's concession of guilt without an express waiver by Defendant on the record constitutes ineffective assistance of counsel *per se* under

[10] Because Nixon invoked his attorney-client privilege to restrict the State's cross-examination of trial counsel, the Florida Supreme Court ultimately declined to "dispose of this claim" on direct appeal on the "present state of the record," and affirmed the convictions and sentences, including the death sentence, "without prejudice" to Nixon raising the issue by way of a Rule 3.850 motion for postconviction relief (App. 364). In Florida, a claim that trial counsel was ineffective is not ordinarily reviewed on direct appeal. Kelly v. State, 486 So.2d 578 (Fla. 1986).

United States v. Cronic, 466 U.S. 648 (1984)." The trial court also rejected Nixon's alternative argument that his trial counsel was ineffective at the guilt phase under the two-part test of Strickland v. Washington, 466 U.S. 668 (1984). The trial court found that "defense counsel's concession of guilt" was an "acceptable defense strategy" in the circumstances of this case, and that Nixon had failed to demonstrate prejudice.

The Florida Supreme Court reversed. Nixon v. State, 758 So.2d 618 (Fla. 2000) (Nixon II)(App. 393-427). The court deemed Corin's concession of guilt to be an abandonment of the defense of his client unless Nixon "explicitly consented" to it. Citing Boykin v. Alabama, 395 U.S. 238 (1969), the court reasoned that Corin's comments were the functional equivalent of a guilty plea and held that Nixon's claim of ineffective assistance of counsel "must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy" (App. 405). Emphasizing that "[s]ilent acquiescence is not enough," the court remanded for an evidentiary hearing to determine whether Nixon expressly consented; if not, he was entitled to a new trial (App. 405).

In dissent, Justice Wells disagreed with the majority's application of Cronic to this case, stating:

> No fair reading of the instant record can lead to the conclusion that Nixon was 'denied any meaningful assistance at all.' [Cronic]. This case must be analyzed in light of Florida's death penalty procedure. Counsel's performance must necessarily consider both the guilt and penalty phases. The trial record demonstrates that counsel made a rational choice, one that a competent, experienced lawyer would be expected to make given the evidence, which was to call no witnesses and emphasize the penalty phase.

(App. 425-26).

At the May 2001, evidentiary hearing before Judge Ferris (mandated by Nixon II), Corin once again testified that his strategy had been to save Nixon's life and that he had explained that strategy to Nixon (App. 458).[11] Corin testified that he had talked to and deposed numerous witnesses, and had discussed "the state of the evidence" with Nixon.[12] He had explained to Nixon that his strategy would be to try to avoid the death penalty and not to affirmatively contest guilt. That strategic decision was not one he would have made "lightly" or without first discussing it with Nixon. He "owed it to my client to tell him what's going on." In Corin's "professional opinion," based on the evidence in this case, such strategy was the "best way to proceed" and possibly the only way to save Nixon's life; if the question of guilt was not going to be a matter that could be the subject of "any reasonable dispute," then it would be much more effective, he testified, to attempt to save Nixon's life through mitigating circumstances at the penalty phase than "going through a trial and arguing things that were not going to make a whole lot of sense." Corin testified that he would not have pursued that strategy against Nixon's wishes. (App. 469-77).

The trial court denied relief. The court found that Corin had prepared for trial, developed a strategy, and kept Nixon informed:

> The only conclusion that can be reached from this uncontroverted testimony is that the pattern of interactions in the attorney-client relationship between Mr. Corin and Mr. Nixon often involved

[11] Nixon himself has never testified on behalf of his Cronic claim.

[12] The defense investigator assigned to Nixon's case testified that Nixon knew the State had some "60 or 70" witnesses against him, and that it "looked pretty bad" (App. 515-16, 518).

> information being provided by Mr. Corin, followed by silence from Mr. Nixon. Whether that pattern of interaction was constructive or helpful is not the issue; rather, Mr. Corin appears to have done all he could to carefully prepare the case for trial, consider the viability of various defenses, inform Mr. Nixon of what was happening with his case, and finally, tell his client what strategies he intended to pursue.

(App. 557-558). The court additionally found that Nixon had consented to Corin's trial strategy, albeit not in words:

> His consent occurred as a part of his natural pattern of communication with Mr. Corin, wherein Mr. Corin would discuss these matters with Mr. Nixon, and Mr. Nixon would refuse to respond. The court finds that the fact that Mr. Nixon did not provide counsel with an affirmative, explicit consent in words, and in the manner that we ordinarily expect and presume is acceptable, does not mean that it was not given. Looking to Mr. Nixon's manner of communicating with counsel and with the court during his jury trial alone, it is obvious that Mr. Nixon is often more comfortable communicating through his behavior rather than the spoken word. The lack of words cannot, and did not, render his communication any less clear or explicit.

(App. 560) (emphasis in original).

On appeal, the Florida Supreme Court once again reversed. Nixon v. State, 857 So.2d 172 (Fla. 2003) (Nixon III) (App. 526-62). Relying on Nixon II, the majority concluded:

> In Nixon II, we found that counsel's comments at trial were the functional equivalent of

a guilty plea. Since counsel's comments operated as a guilty plea, in order to affirm the trial court's ruling, the record must contain substantial evidence which would enable this Court to determine that Nixon did more than silently submit to counsel's strategy. There is no evidence that shows that Nixon affirmatively, explicitly agreed with counsel's strategy. The only evidence presented at the evidentiary hearing was Corin's testimony, which indicated that Nixon neither agreed nor disagreed with counsel's trial strategy. Thus, there is no competent, substantial evidence which establishes that Nixon affirmatively and explicitly agreed to counsel's strategy. Without a client's affirmative and explicit consent to a strategy of admitting guilt to the crime charged or a lesser included offense, counsel's duty is to "hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt." Nixon II, 758 So.2d at 625 (emphasis added). Since we held in Nixon II that silent acquiescence to counsel's strategy is not sufficient, we find that Nixon must be given a new trial.

(App. 533-34) (emphasis in original).

Rehearing was summarily denied October 1, 2003 (App. 563).

SUMMARY OF THE ARGUMENT

Nothing in Strickland authorizes the imposition of mechanical rules on counsel, which could "distract counsel from the overriding mission of vigorous advocacy of the defendant's cause," 466 U.S. at 689, nor does anything in Cronic contemplate presuming both components of the Strickland test for ineffective assistance of counsel, or presuming that trial counsel's performance is constitutionally deficient even though he has conducted a reasonable investigation and chosen a reasonable trial strategy based upon that investigation.

Neither counsel nor Nixon pled guilty; instead, Nixon went to trial and counsel strategically challenged the State's case. When counsel investigates, prepares for trial and discusses trial strategy with his client, Strickland is the sole analysis upon which to judge his performance. The issue is not whether a defendant had counsel in such circumstances, but rather whether counsel's actions were effective. Here the concessions by counsel were the product of reasonable strategy developed to protect the best interest of a client.

Nixon acquiesced to counsel's strategy. The Florida Supreme Court erred in holding that trial counsel could act in what he perceived to be Nixon's best interests only with Nixon's explicit, verbal consent, and by finding trial counsel ineffective *per se* absent such expressed consent, without regard to how reasonable or effective counsel's strategy was.

ARGUMENT

THE FLORIDA SUPREME COURT ERRED IN CONCLUDING THAT NIXON'S TRIAL COUNSEL WAS INEFFECTIVE *PER SE* IN PURSUING AN EFFECTIVE STRATEGY ACQUIESCED TO BY NIXON AND REASONABLY CALCULATED TO AVOID A DEATH SENTENCE.

The Florida Supreme Court recognized that Nixon's trial counsel Michael Corin, faced with a "virtually indefensible" guilt phase, decided not to sacrifice what he felt was Nixon's "best chance" by making arguments the jury was going to reject anyway, and to pursue a strategy of candor at the guilt phase in an effort to maximize his chances of making a persuasive case for a life sentence at the penalty phase. Although a majority of the Florida Supreme Court concluded that Corin made a strategic decision which was effective and reasonably calculated to help Nixon avoid a death sentence (App. 409, 418-19), the court determined, nevertheless, that the reasonableness and effectiveness of that strategy was irrelevant. In its view Corin's strategy was the functional equivalent of a guilty plea, and the waiver standards of guilty pleas, as set out in Boykin v. Alabama, 395 U.S. 238 (1969), should be applied. Nixon was the "captain of his ship," said the court, and, absent "affirmative, explicit consent" by Nixon to his counsel's trial strategy, Corin's adoption of that strategy was ineffective *per se* under United States v. Cronic, 466 U.S. 648 (1984).

This case presents two questions: First, does Strickland or Cronic establish the appropriate standard of review of a claim of ineffective assistance of counsel in a capital case where defense counsel, as a matter of strategy in the face of overwhelming evidence, chooses not to contest guilt in order to enhance defense credibility at the penalty phase? Second, can trial counsel's strategic opening and closing comments be characterized as the

functional equivalent of a guilty plea requiring the application of Boykin to this case and others like it?

The Florida Supreme Court answered these questions incorrectly; in so doing, the court improperly established "mechanistic rules governing what counsel must do," and improperly rejected the "circumstance-specific reasonableness inquiry mandated by Strickland." Roe v. Flores-Ortega, 528 U.S. 470, 478-79 (2000).

I

Corin's trial performance should be reviewed under Strickland; Cronic's presumption of prejudice cannot apply when counsel has investigated the case and has made a strategic decision designed to benefit the defendant; here, Corin's guilt-phase concessions were reasonable trial strategy that cannot be deemed a "total" failure to act as an advocate on Nixon's behalf.

Claims of ineffective assistance of counsel generally require a showing: (1) that the attorney's performance was deficient, falling below professional standards of competence; and (2) that the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687-88, 694. The Court has stated "whether we require the defendant to show actual prejudice . . . or whether we instead presume prejudice turns on the magnitude of the deprivation of the right to effective assistance of counsel." Roe v. Flores-Ortega, supra, 528 U.S. at 482. Prejudice may be presumed only if the defendant was – "either actually or constructively – denied the assistance of counsel altogether." Id. at 483. When a defendant *has* counsel, the Strickland standard governs a defendant's claim that his counsel was constitutionally deficient, unless that counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." Cronic, 466 U.S. at 659. For Cronic's presumed prejudice standard to apply, that counsel's "failure must

be *complete*." Bell v. Cone, 535 U.S. 685, 696-97 (2002) (emphasis supplied). A trial counsel's failure to test the State's case merely at "specific points" is insufficient to relieve the defendant of his burden to prove both deficient attorney performance *and* prejudice. Ibid.

The Florida Supreme Court apparently viewed Corin's guilt-phase concession strategy as having "entirely fail(ed) to subject the prosecution's case to meaningful adversarial testing." Nixon II (App. 400-02).[13] However, Corin's reasonable strategic decision cannot properly be deemed a "failure" at all. In a capital trial, the most important issue may not be guilt but sentence.[14] In

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[13] The court expressly found only that Corin's opening statements and closing argument "raise a question" as to whether Corin failed to subject the State's case to meaningful adversarial testing, but the court implicitly answered the "question" in the affirmative. (App. 400-02).

[14] See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 329 (1983) (cited in Strickland v. Washington, supra, 466 U.S. at 662, fn. 32):

> In many capital cases, the evidence of guilt is overwhelming. Such cases go to trial either because the prosecutor will not bargain for a sentence less than death or because the defendant will not accept a sentence of life imprisonment without the possibility of parole. In these cases, although the defendant will almost certainly be convicted, the defendant has nothing to lose by proceeding with a trial on the capital charges. However, *if the guilt phase is virtually indefensible, inappropriate guilt phase advocacy could so prejudice the sentencer that no persuasive case for a life sentence can be made at the sentencing phase.*

See also: 1 Molly Treadway Johnson & Laural L. Hooper, Resource Guide for Managing Capital Cases 43 (2002) ("A noted capital defense attorney with whom we spoke pointed out that attorneys often view a capital case as a 'penalty-phase case' and try the guilt phase of the case accordingly. During the guilt phase, a defense attorney does not want to make an

this capital case in which the evidence of guilt was overwhelming, it was not unreasonable for Corin to have attempted to avoid a death sentence for Nixon by being candid with the jury about the sufficiency of the State's evidence.[15]

Clearly, there were potential benefits to Nixon in having a trial, even if Corin did not contest guilt: First, the State was put to its burden of proof, and there was always a possibility that the

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argument that will be inconsistent with what he or she will argue at the penalty phase. For example, denying guilt outright in the guilt phase might be a strategic mistake if during the penalty phase the defendant wants to argue that certain factors (e.g., a deprived childhood, a mental illness) led him or her to commit the crime. Several judges noted that such strategic decisions had apparently been made by attorneys in their death-penalty cases."); Russell Stetler, Commentary on Counsel's Duty to Seek and Negotiate A Disposition in Capital Cases (ABA Guideline 10.9.1), 31 Hofstra L. Rev. 1157, 1165 (Summer 2003) ("The revised ABA Guidelines place proper emphasis on the need to take every possible step towards resolving capital cases for a sentence less than death, once counsel has independently evaluated the evidence supporting conviction.").

[15] See Yarborough v. Gentry, 540 U.S. ___, 124 S.Ct. 1 (2003) (quoting J. Stein, Closing Arguments Section 204, p. 10: "(I)f you make certain concessions showing that you are earnestly in search of the truth, then your comments on matters that are in dispute will be received without the usual apprehension surrounding the remarks of an advocate."); People v. Mayfield, 852 P.2d 331, 343-44 (Cal. 1993) (defense counsel's concession that defendant was guilty of murder in attempt to avoid death sentence not an abandonment of defendant or an unreasonable tactical choice, because "candor may be the most effective tool available to counsel"); State v. Abshier, 28 P.2d 579, 594 (Okla. Crim. App 2001) (it was "proper trial strategy" for counsel to "candidly concede guilt early in the trial in order to establish credibility with the jury" in the hope that the jury could be persuaded to vote for a sentence less than death); Evans v. State, 725 So.2d 613 (Miss. 1997) (in capital case, concession that jury would likely find defendant guilty of murder was reasonable and permissible trial strategy of candor designed to help the defendant at the sentencing phase); State v. Scott, 800 N.E. 1133 (Ohio 2004) (counsel's concession of guilt to all offenses in the face of overwhelming evidence enhanced counsel's credibility with the jury to plead for defendant's life).

State, through carelessness or inadvertence, would fail. Second, there was a possibility that the State would commit some reversible error at trial, and the State could well have been more amenable to a plea for life if faced with a second trial. Third, by having a trial, all the State's "bad stuff" would come in at the guilt phase instead of the penalty phase; while the State would likely remind the jury that it could consider the guilt-phase evidence while deciding a recommended sentence, nevertheless, the temporal separation arguably would dilute the impact of the aggravation and allow for a stronger focus on mitigation. Finally, Corin's guilt-phase "candor" could (and probably did) enhance his credibility at the penalty phase. The strength of these potential benefits might be debatable among reasonable attorneys, but they are not so hopelessly phantasmagorical as to compel a *per se* rejection of Corin's strategy.[16]

There is a strong presumption that, when counsel has "focused on some issues to the exclusion of others, he did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, supra. Here, it is undisputed that Corin's "focus" was the product of a deliberate tactical choice, adopted because Corin deemed it to be Nixon's best chance of avoiding a death sentence. Corin was not the equivalent of "no lawyer"; after fully

[16] See Scott E. Sundby, Symposium: The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty, 83 Cornell L. Rev. 1557 (September 1998) (where defendant is the sole actor in the crime, mounting a denial defense in hopes of creating "lingering doubt" sufficient to sway a jury towards a life sentence at the penalty phase "may actually increase the likelihood that the jury will reach a sentence of death"; moreover, even when presenting an "acceptance of responsibility theme . . . it is often strategically unwise to enter a guilty plea and thereby move the trial directly into the penalty phase," as that "concentrates all of the aggravating evidence into the penalty phase rather than allowing to hear at least the crime evidence at the guilt stage, which may help diminish its impact by the time the penalty phase takes place"; "[d]epending on the nature of the evidence, the most effective defense at the guilt-innocence phase might be as simple as a tacit guilty plea that *expressly establishes a theme of accepting responsibility*") (emphasis supplied).

investigating the possibilities, he developed a reasonable strategy designed to benefit his client. Nixon simply was not "denied any meaningful assistance of counsel at all," and thus Corin's performance should not have been deemed presumptively prejudicial under Cronic.[17]

Where, as here, trial counsel's concession is the product of a strategic choice made in the defendant's best interest after full investigation and preparation, counsel's concession of guilt should be analyzed under the two part test of Strickland, to determine whether trial counsel's performance was (a) deficient and (b) prejudicial.[18]

II

Counsel is not required to obtain a client's affirmative, explicit consent to trial strategy.

Notwithstanding any general presumption against a defendant's acquiescence in the waiver of constitutional rights, Johnson v. Zerbst, 304 U.S. 458, 464 (1938), fundamental rights may be forsaken if not asserted. Nixon never objected to Corin's strategy, never chose another strategy, never showed that Corin failed adequately to consult with Nixon, and never showed that Corin otherwise was guilty of such overbearing conduct as to unfairly override Nixon's expressed wishes. On the contrary, Nixon fully acquiesced to counsel's strategy. The Florida Supreme Court

[17] In effect, the Florida Supreme Court concluded that Corin was effective under Strickland, but ineffective under Cronic. Nothing in Strickland or Cronic supports such a result.

[18] The record shows that counsel prepared extensively for Nixon's trial. This is not a case in which trial counsel's strategic choices are invalid because counsel failed to conduct a reasonable investigation, as in Wiggins v. Smith, 539 U.S. 510 (2003). Moreover, even in such cases, whether a defendant has received competent representation by his counsel must be analyzed under Strickland.

erred in forbidding counsel from pursuing that strategy, no matter how reasonable under the circumstances, absent explicit, verbal acceptance of that strategy by Nixon.[19]

In Strickland, the Court rejected "specific guidelines" to "exhaustively define the obligations of counsel," 466 U.S. at 688, observing: "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." 466 U.S. at 688-89. Generally, an attorney appointed to represent an indigent criminal defendant "has – and must have – full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval." Taylor v. Illinois, 484 U.S. 400, 418 (1988). The "basic thesis" of decisions according criminal defendants the right to counsel is that "the help of a lawyer is essential" to a fair trial because the defendant "lacks the skill and knowledge" to identify or present his most effective defense. Faretta v. California, 422 U.S. 806, 832-33, and fn. 43 (1975) (internal cites omitted). In recognition of the "superior ability" of "trained counsel" to evaluate the strengths and weaknesses of a case, and to advocate the client's cause, the Court has rejected a *per se* rule that "the client, not the professional advocate, must be allowed to decide what issues are to be pressed." Jones v. Barnes, 463 U.S. 745, 751 (1983). Otherwise, counsel is reduced to standby status. McKaskle v. Wiggins, 465 U.S. 168, 177-78 (1984) (role of standby counsel is limited; standby counsel cannot override defendant's tactical decisions, control the

[19] Petitioner has always maintained that Nixon consented by his acquiescence to the strategy proposed to him by his trial counsel. The Florida Supreme Court, however, insisted on *affirmative* and *explicit* consent, and rejected Judge Ferris' conclusion that Nixon had consented to counsel's strategy, albeit not in words (App. 533-34, 560).

questioning of witnesses, or speak in place of the defendant on any matter of importance).[20]

While an attorney generally has the right to make tactical decisions regarding trial strategy, the Court has addressed four fundamental areas reserved to the defendant personally: "[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Jones v. Barnes, supra, 463 U.S. at 751.[21] However, the Court has not expanded this list, and in fact has rejected opportunities to do so. See Jones at 753-54 (attorney may reject defendant's request to argue nonfrivolous issue on appeal; *per se* rule adopted by court below was "contrary to all experience and logic" and would "disserve the very goal of vigorous and effective advocacy that underlies" Court's recognition that the "role of the advocate 'requires that he support his client's appeal to the best of his ability.'")(internal cites omitted); Taylor v. Illinois, supra ("Putting to one side the exceptional case in which counsel is ineffective, the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain

[20] See United States v. Taylor, 933 F.2d 307, 312 (5th Cir. 1991) ("The very definition of full-fledged counsel includes the proposition that the counselor, and not the accused, bears the responsibility for the defense; by contrast, the key limitation on standby counsel is that such counsel not be responsible - and not be perceived to be responsible - for the accused's defense.").

[21] The American Bar Association's most recent formulation assigns five specific choices to the accused personally (what plea to enter, whether to accept a plea agreement, whether to waive jury trial, whether to testify in his or her own behalf, and whether to appeal). Every other trial decision, strategic and tactical, is assigned to counsel. ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 4-5.2 (3d ed. 1993)

witnesses in advance of trial."). None of the fundamental decisions addressed in Jones is at issue here.

Moreover, even "the most basic rights of criminal defendants are...subject to waiver," Peretz v. United States, 501 U.S. 923, 936 (1991). "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." United States v. Olano, 507 U.S. 725, 733 (1993).

So, for example, while a defendant has the ultimate right to decide whether to take an appeal, the Court has never required an on-record waiver of that right, or insisted that an appeal be taken unless the defendant expressly agreed that no appeal should be filed. On the contrary, the Court recently held that counsel had no *per se* constitutional duty to file an appeal "when the defendant has not clearly conveyed his wishes one way or the other." Roe v. Flores-Ortega, supra.[22] Likewise, while the defendant himself has the final decision whether to testify, Rock v. Arkansas, 483 U.S. 44 (1987), the Court has never required an "on-record" waiver of that right, or insisted that an attorney summon his client to the stand unless the defendant expressly agrees with the attorney's strategic decision not to call him. Put another way, the Court has never held that an attorney must put an uncooperative client on the stand and subject him to cross-examination merely because the defendant has declined to choose whether to testify.[23] And, while a defendant has

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[22] Absent expressed instruction by the defendant to file an appeal, an attorney's failure to file an appeal would be evaluated for reasonableness under the Strickland standard.

[23] The overwhelming majority of lower federal courts have rejected any requirement of an on-record waiver of a defendant's right to testify. E.g., United States v. Brown, 217 F.3d 247, 258 (5th Cir.), *cert. denied* 531 U.S. 973 (2000). See also, Taylor v. United States, 287 F.3d 658 (7th Cir. 2002) (while defendant may not be prohibited from testifying, advice of

the constitutional right to represent himself, Faretta v. California, supra, the Court has not forced a defendant to represent himself if he failed expressly to waive that right. Rather, the Court has required a hearing to determine whether a defendant's waiver of his *right to counsel* is knowing, intelligent and voluntary, but has not required a hearing to determine if a defendant has voluntarily waived his *right to represent himself*. The latter right is deemed waived if the defendant acquiesces in the appointment of counsel.[24]

The Florida Supreme Court primarily focused on Nixon's assumed right to reject Corin's trial strategy, ignoring the potential impact of such a presumed right upon another important right of the defendant: his right to effective assistance of counsel. Indeed, the court acknowledged that forcing Corin to contest guilt might have "worked to Nixon's detriment," but held that "Nixon himself must bear the responsibility for that decision." Nixon II, (App. 406).

Nixon, however, *never made that decision*, and cannot, by his acquiescence, be deemed to have waived his right to effective

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rights and formal waivers are not essential to a voluntary decision not to testify).

[24] In cases involving other possible "fundamental" decisions arguably left to the defendant himself, lower federal courts have declined to require an attorney to obtain his client's expressed permission before pursuing prudent trial strategy. See, e.g., United States v. Cooper, 243 F.3d 411 (7th Cir.), *cert. denied*, 534 U.S. 825 (2001) (defense counsel can waive his client's Sixth Amendment confrontation rights so long as the defendant does not expressly dissent); Dean v. Superintendent, 93 F.3d 58 (2nd Cir. 1996), *cert. denied*, 519 U.S. 1129 (1997) (assuming, *arguendo*, that the Constitution "prohibits counsel from imposing an insanity defense on an unwilling defendant," such right would be "derivative" of the "right to make a defense," citing Faretta, and thus would be subjected to practical constraints; a defendant who seeks postconviction relief on the ground that trial counsel imposed an insanity defense against the defendant's wishes must show "that he in fact objected"; a defendant who did not object at trial must show not only that he "disagreed" with counsel, but that his "will was overborne" by counsel).

assistance of counsel or his attorney's obligation to provide the best representation possible under the circumstances, any more than Faretta could have been deemed to have waived his right to counsel by failing to expressly consent to counsel, or Rock could be deemed to have waived his right to silence by failing expressly to agree not to testify, or Flores-Ortega could be deemed to have waived his right to appeal by failing expressly to demand an appeal, or Boykin could be deemed to have waived his right to trial by standing mute when asked to plead. The Florida Supreme Court erred in holding that Corin could act in what he perceived to be Nixon's best interests only with Nixon's expressed, verbal consent.[25]

Nixon was not deprived of any possible constitutional right to decide. If a defendant may be deemed to have accepted counsel by acquiescence, Faretta, supra, he should likewise be deemed to have accepted the strategic decisions of that same counsel by acquiescence. Instead of applying a *per se* presumption of deficient

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[25] "[A] defendant's right to insist that a defense be presented at the initial phase of the trial will inevitably impinge on defense counsel's handling of the case." People v. Frierson, 705 P.2d 396, 404 (Cal. 1985). This may be a tolerable result if the defendant himself has actually so insisted, for at least any impingement is by the defendant himself, not by a court. In this case, Nixon did not insist on any particular strategy at the guilt phase of trial, but one has nevertheless been imposed on trial counsel by the Florida Supreme Court, despite its acknowledgment that the strategy chosen by defense counsel was reasonable and effective, and despite its acknowledgment that expressly contesting guilt could have worked to Nixon's detriment at the penalty phase. In fact, under the logic of its opinions in Nixon II and III, the Florida Supreme Court would have deemed Corin ineffective *per se* if his strategy had succeeded and he had persuaded the jury to recommend a life sentence, even if that had been the most defendant-favorable result possible. See Traub, "The Life Preserver", The New Yorker, April 8, 1996 (discussing New York state capital defender Kevin Doyle's representation of a capital murder defendant in Alabama, for whom he successfully obtained a life sentence by conceding guilt; noting that when the State seeks a death sentence for an obviously guilty defendant, a life-without-parole sentence is a defense "win").

performance based on lack of expressed consent, the Florida Supreme Court should have reviewed Corin's strategy for reasonableness under Strickland.[26]

Finally, Corin's statements to the jury cannot be deemed the equivalent of a guilty plea. Boykin holds that a trial judge may not accept a defendant's plea of guilty absent an on-record demonstration that it was intelligent and voluntary. 395 U.S. at 241-42. The Court emphasized, however, that a plea of guilty is "more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment." Id. at 242. A plea of guilty is thus a conviction *without proof*, since the plea "serves as a stipulation that no proof by the prosecution need be advanced. . . . It supplies both evidence and verdict, ending controversy." Id. at 243 (fn. 4) (quoting Woodard v. State, 42 Ala. App. 552, 558, 171 So.2d 462, 469). Because a defendant who pleads guilty gives up an assortment of rights, including the right to a trial itself, an on-record waiver in accordance with what Justice Harlan described as "the rigid prophylactic requirements of Rule 11 of the Federal Rules of Criminal Procedure," Id. at 245 (Harlan, J., dissenting), was deemed a necessary precondition to acceptance of a guilty plea.

Corin did not deprive Nixon of his right to trial, or any of the rights enumerated in Boykin. Although the Florida Supreme Court construed Corin's statements as a concession of guilt, Corin never expressly conceded that Nixon was guilty of first degree murder.[27] More importantly, Corin's statements were neither

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[26] The trial-level judicial inquiry mandated by Nixon II (App. 406-07) introduces additional concerns of interference with, and judicial micro-management of, the attorney-client relationship in a manner that is utterly contrary to the Court's Strickland decision.

[27] Corin acknowledged in opening that the victim had died and that Nixon had caused that death, and further acknowledged in concluding that he thought the jury would "probably" find Nixon guilty beyond a reasonable doubt on all counts, but he did not explicitly admit or concede the elements

evidence nor stipulation, and did not relieve the State of its burden to present evidence or to prove guilt beyond a reasonable doubt, as the prosecutor himself expressly acknowledged to the jury in his closing argument, and as the trial court expressly charged the jury. Had the State responded to Corin's opening statement by resting without presenting any evidence, the jury could not lawfully have convicted Nixon.[28] Likewise, had the State "let down its guard" because of the concession, and failed to present legally sufficient evidence supporting every essential element of the crime charged, the jury could not lawfully have convicted Nixon. Therefore beyond peradventure, the State was obliged to (and did) present evidence that was not merely legally sufficient to convict, but also sufficiently credible and weighty to convince the jury of Nixon's guilt beyond a reasonable doubt.[29] The trial court did not direct a verdict, but instructed the jury, properly, that the State bore the burden of proof beyond a reasonable doubt. Thus, the State was held to its burden of proof beyond a reasonable doubt, even if Corin did not expressly contest it.[30] In fact, a variety of issues were

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of intent or premeditation. or suggest that the jury need not find that the State had met its burden of proof.

[28] The Florida Supreme Court automatically reviews all capital convictions for sufficiency of the evidence. Tibbs v. State, 397 So.2d 1120, 1126 (Fla. 1981); Stano v. State, 473 So.2d 1282, 1288 (Fla. 1985).

[29] A defendant who pleads guilty waives review for sufficiency of the evidence; indeed; a defendant may plead guilty while expressly denying his guilt. North Carolina v. Alford, 400 U.S. 25 (1970). While the State must provide a factual basis of guilt at a plea hearing, under Florida law it does *not* have to prove guilt beyond a reasonable doubt, and the evidence is not reviewed for sufficiency on appeal. Koenig v. State, 597 So.2d 256 (Fla. 1992).

[30] By contrast, defense counsel in Brookhart v. Janis, 384 U.S. 1 (1966), agreed to a "prima facie" bench trial at which the State would be relieved of its obligation to put on "complete proof" of guilt or to persuade a jury of the defendant's guilt beyond a reasonable doubt. Moreover, even in Brookhart, the Court did not require a personal waiver by the defendant;

preserved for appeal notwithstanding Corin's concession that would not have been preserved if Nixon had pled guilty, including appellate review for sufficiency of the evidence and appellate review of issues that trial counsel preserved for appeal, such as the introduction of allegedly inflammatory photographs and allegedly improper prosecutorial closing argument.[31]

Neither defense counsel nor Nixon entered a guilty plea to the charges and Nixon was not denied a jury trial. Defense counsel required the State to bear its burden of proof beyond a reasonable doubt, and defense counsel did not surrender any of Nixon's other rights. See, e.g., United States v. Gomes, 177 F.3d 76, 84 (1st Cir. 1999) ("[Appellant's] cursory analogy to a guilty plea without safeguards (including the explicit consent and participation of the defendant and a good many formalities as well, Fed.R.Crim.P 11) is a false one. Counsel's concession was not a guilty plea, which involves conviction without proof, and is therefore properly hedged with protections. Here the government had to provide a jury with admissible evidence of guilt and did so in abundance.").

The Florida Supreme Court erred in applying Boykin's "rigid prophylactic" rule to a claim that trial counsel was ineffective at a jury trial the defendant received.[32]

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the Court granted relief because the "petitioner neither personally waived his right *nor acquiesced* in his lawyer's attempted waiver." 384 U.S. at 8 (emphasis supplied).

[31] On appeal, Nixon raised "seven claims in connection with the guilt phase of the trial and eight claims in connection with the penalty phase." Nixon I (App. 361).

[32] Further, the decision below, which, in a postconviction proceeding, effectively places the burden on the State to demonstrate that Nixon explicitly agreed with his trial counsel's strategy, is inconsistent with the Court's decision in United States v. Vonn, 535 U.S. 55 (2002) (absent plain error, defendant's failure to object to plea procedures at trial is a waiver of objection; where a defendant fails to speak up "when a mistake can be fixed," the defendant bears the burden of proving prejudice).

In summary, Boykin and Strickland/Cronic are separate inquiries and should not be intermingled. Trial counsel did not plead his client guilty, and his guilt-phase strategy was not the functional equivalent of a guilty plea. Counsel neither relieved the State of its burden of proof nor deprived Nixon of a jury trial. Nixon's acquiescence to counsel's strategy was sufficient to foreclose any claim of a violation of Nixon's right to decide strategy. The Florida Supreme Court erred by finding trial counsel ineffective *per se* regardless of the sufficiency of trial counsel's investigation, preparation and performance, or of the soundness of his strategic decision.

CONCLUSION

The Florida Supreme Court's judgment should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

STATE OF FLORIDA,

Petitioner,

v.

JOE ELTON NIXON,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR RESPONDENT JOE ELTON NIXON

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July 21, 2004

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BRIEF FOR RESPONDENT JOE ELTON NIXON

OPINIONS BELOW*

The decision to be reviewed is reported as *Nixon v. State*, 857 So. 2d 172 (Fla. 2003) [hereafter, "*Nixon III*"]. An earlier decision of the Florida Supreme Court in this same postconviction proceeding is reported as *Nixon v. Singletary*, 758 So. 2d 618 (Fla. 2000) [hereafter, "*Nixon II*"]. That is the decision in which the Florida Supreme Court addressed the legal issues raised in the instant petition for *certiorari*. (In *Nixon III* the Florida Supreme Court simply applied the law established in *Nixon II* to the factual record made on remand at an evidentiary hearing ordered by *Nixon II*.) The decision of the Florida Supreme Court affirming the first-degree murder conviction and death sentence of respondent Joe Elton Nixon on direct appeal is reported as *Nixon v. State*, 572 So. 2d 1336 (Fla. 1991) [hereafter, "*Nixon I*"].

JURISDICTION

The Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The case involves the Sixth and Fourteenth Amendments, reading in relevant part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial

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* Citations to the record are as follows: "JA." designates the Joint Appendix in this Court. "R." designates the 12 volumes of the original record in the Florida Supreme Court below, numbered pages 1 to 2104. "3.850 R." designates the 23 volumes of the postconviction record in the Florida Supreme Court below, numbered pages 1 to 4393. "FA." designates an Appendix submitted by Nixon in the Florida Supreme Court below.

jury . . . ; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." (U.S. CONST. amend. VI.)

"No State shall . . . deprive any person of life [or] liberty . . . without due process of law . . . ." (U.S. CONST. amend. XIV, § 1.)

STATEMENT OF THE CASE

1. The crime, according to the prosecution's uncontested evidence

The opinion of the Florida Supreme Court on Mr. Nixon's direct appeal describes the circumstances of the crime as they were made to appear by the prosecution's evidence at trial, which was not contested by Nixon's trial counsel:

> "On Monday, August 13, 1984, the charred body of Jeanne Bickner was found tied to a tree in a wooded area in Leon County. The next morning Ms. Bickner's car, the interior and trunk of which had been gutted by fire, was found in a Tallahassee drainage ditch. The same day, after receiving information from Joe Elton Nixon's girlfriend, Wanda Robinson, and brother, John Nixon, that he had admitted the killing, had been driving the victim's car prior to burning it, and had pawned two of her rings, Tallahassee police arrested Nixon. Nixon was charged with first-degree murder, kidnapping, robbery, and arson.
>
> "At trial, there was testimony that after church on August 12, 1984, Ms. Bickner went to a local mall to have lunch with friends. She parked her orange M.G. convertible in the mall parking lot. Ms. Bickner was later seen in the parking lot giving a black man jumper cables from the trunk of her car. Witnesses testified that on the afternoon of August 12 they saw the orange M.G. driven by a black male, later identified as Nixon, near the vicinity of the site where the body was found. Ms. Bickner's body was discovered by a couple riding through the woods who reported the incident to the police. The charred body was in a seated position tied around the waist with jumper cables to a pine tree. Her left arm was tied to another pine tree. Wanda Robinson, John Nixon and other witnesses testified that they saw Nixon driving Ms. Bickner's orange M.G. Robinson and John Nixon also testified that Nixon admitted killing a white woman by tying her with jumper cables and burning her. Nixon also showed them two of Ms. Bickner's rings and later said he had pawned the rings. Robinson and John Nixon also testified that on the morning of the fourteenth, Nixon told them that he was going to burn the orange M.G. There was testimony that Nixon attempted to sell the M.G. prior to burning it. A pawn shop receipt signed by Nixon for two of Ms. Bickner's rings was entered into evidence. A laboratory analyst for the Florida Department of Law Enforcement testified that Nixon's palm print was found on the trunk lid of Ms. Bickner's M.G.
>
> "After his arrest, in a taped confession which was played to the jury, Nixon admitted murdering Ms. Bickner. He described how he met Ms. Bickner at the mall and asked her to take him to his uncle's house because he was having car trouble. Once on the road, Nixon hit Bickner in the face. When she stopped the car, Nixon put her in the trunk and then drove to a secluded wooded

area where he took her from the trunk and tied her to a tree with jumper cables. According to Nixon, the two talked about their lives. Ms. Bickner offered to give Nixon money, to sign her car over to him, begging him not to kill her. Nixon recounted how he burned Ms. Bickner's personal belongings and then threw the top of the convertible into the fire. At some point after placing a paper bag over her head, Nixon threw the smoldering convertible top on Ms. Bickner, setting her on fire. He then left the scene in the M.G. According to the medical examiner, Ms. Bickner was alive at the time she was set on fire and the fire was the cause of death." (*Nixon I*, 572 So. 2d at 1337-38 [footnote omitted].)

2. The trial *in absentia*

Nixon was indicted for first-degree murder and associated offenses. In the week before trial,

> "Nixon refused to be present during a hearing on various pretrial motions. In both instances counsel waived Nixon's presence for the limited purpose of hearing the motions. Although Nixon was present at the commencement of jury selection on July 15, 1985, as voir dire continued on the morning of July 16, 1985, Nixon refused to enter the courtroom. Defense counsel explained to the judge that Nixon had disrobed to his underwear, and was demanding a black judge and a black attorney, and did not wish to return to the courtroom. After a recess, Nixon still refused to attend the trial. The trial judge then inquired of the bailiff as to why Nixon had not returned. The judge was informed that Nixon had told another officer that he was not going to court 'for them to railroad me.' Defense

> counsel informed the judge that Florida Rule of Criminal Procedure 3.180(b) allowed a defendant to voluntarily absent himself from the courtroom if the court chose to try Nixon in absentia. The trial court conducted a hearing in the holding cell to determine if it would be in Nixon's best interest to allow him to absent himself from the proceedings. During the hearing, Nixon was clad only in his underwear. He reiterated to the judge that he did not wish to return to the courtroom, that he wanted another attorney and wanted to return to the jail-house. Nixon threatened that if forced to return to the courtroom, 'I still [sic] run my mouth and speak when I get ready unless you tape it up.' Nixon repeatedly stated that he wanted to return to the jail-house and did not care if the trial proceeded without him. After questioning the officer who had transported Nixon from the jail to the holding cell concerning the events leading up to appellant's removal of his clothes and desire to return to the jail-house, the trial court indicated that if Nixon did not return to the courtroom that afternoon, the court would consider his decision 'to be a knowledgeable, voluntary and intelligent waiver of his right to be present during the course of the trial.' When Nixon refused to return to the courtroom that afternoon, the court found that Nixon had knowingly, intelligently, and voluntarily waived his attendance and that the proceedings would continue without him." (*Nixon I*, 572 So. 2d at 1341.)[1]

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[1] The portions of the hearing in the holding cell that deal with Nixon's reasons for absenting himself from the trial are as follows:

"THE COURT: . . . Your attorney Mr. Corin and other folks have told me that you don't want to go into the courtroom.

(*footnote continued*)

The remainder of Nixon's jury trial upon his plea of not guilty was conducted *in absentia* except for a brief period not presently relevant.

"MR. NIXON: Correct.
"THE COURT: Could you tell me why?
"MR. NIXON: I want another attorney.
"THE COURT: Well, I don't think I'm going to do that. Have you got any other reasons you don't want to go in?
"MR. NIXON: Well, I ain't got no business in there.
"THE COURT: Well, you're the one that's on trial, and we're in to the second day. And yesterday, we got several of the jurors, if not selected, at least eligible to be selected. And you were there at that time. You seemed to be doing well. What happened?
"MR. NIXON: That's personal.
"THE COURT: Sir?
"MR. NIXON: That's personal. Y'all go ahead and have your trial if you want, but leave me out of it. You can sentence me, hang me, do what you want, but leave me out of it. If you don't give me no other lawyer. I ain't got no rap, none of me. Take me back to the jail and have Court without me. I don't care.
". . . . .
"THE COURT: . . . What I need to know is are you going to come in and behave or not?
"MR. NIXON: I want to go to the jail house.
"THE COURT: You want to go to the jail house?.
"MR. NIXON: Yes.
"THE COURT: You realize that if you do that, you are not going to be there while your trial is taking place?
"MR. NIXON: I ain't got no lawyer.
"THE COURT: Well, you have one of the best I've run across. I still need to know whether you will come in there. You want to go to the jail house or you want to go in the courtroom?
"MR. NIXON: I want to go to the jail house right now.
"THE COURT: You realize that if you do that, you are giving up your right to be present when your case is taking place?
"MR. NIXON: I don't care nothing about that case. Never did care nothing about it.
"THE COURT: It's your life that's involved. You don't care about that?
"MR. NIXON: I care enough about my life just as much as you care about it.
"THE COURT: Don't you want to protect it?
"MR. NIXON: Do you want to protect it?

(footnote continued)

3. Defense counsel tells the jury Nixon is guilty beyond a reasonable doubt of every element of a horrible first-degree murder

As the Florida Supreme Court subsequently related, Nixon's court-appointed lawyer, Michael Corin,

> "made the following remarks during his opening statement in the guilt phase:
>
> > "In this case, there will be no question that Jeannie [sic] Bickner died a horrible, horrible death. Surely she did and that will be shown to you. In fact, that horrible tragedy will be proved to your satisfaction beyond any reasonable doubt.
> >
> > "In this case, there won't be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie [sic] Bickner's death. Likewise, that fact will be proved to your satisfaction beyond any reasonable doubt. This case is about the death of Joe Elton Nixon and whether it should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement.
>
> ". . . During his closing argument, Nixon's counsel said:
>
> > "Ladies and gentlemen of the jury, I wish I could stand before you and argue that what happened wasn't caused by Mr. Nixon, but we all know better. For several very obvious and apparent reasons, you have been and will continue to be involved in a very unique-

"THE COURT: Yes, sir. That's part of my job.
"MR. NIXON: You don't want to protect it. So, you see, I don't want to hear that. I care just as much as you rednecks care about myself. You don't give a damn just like I don't. That's the bottom line." (R. 335–38.)

ly tragic case. In just a little while Judge Hall will give you some verdict forms that have been prepared. He'll give you some instructions on how to deliberate this case. After you've gotten those forms and you've elected your foreperson and you've done what you must do, you will sign those forms. I know you are not going to take this duty lightly, and I know what you will decide will be unanimous. I think that what you will decide is that the State of Florida, Mr. Hankinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson." (*Nixon II*, 758 So. 2d at 620.)[2]

4. Conviction, and an indecisive appeal

The jury convicted Nixon of each of the crimes itemized in counsel's argument and he was sentenced to death after a sentencing proceeding at which both sides presented evidence. On direct appeal, he contended that counsel's concessions of guilt in argument "were the functional equivalent of a guilty plea, requiring a record

[2] Defense counsel conducted almost no cross-examination during the prosecution's case—asking only a few desultory questions apparently aimed at clarifying statements made on direct by a few of the State's 35 witnesses and waiving cross-examination of the rest. (*See* the analysis presented in Claim V.L ["Trial Counsel did not Impeach or Cross-Examine any of the State Witnesses"] of Nixon's Motion to Vacate Judgment of Conviction and Sentence of Death filed October 7, 1993 at 3.850 R. 500–12, a portion of Nixon's *Strickland* claim that was not reached by the Florida Supreme Court below.) After the prosecution rested, defense counsel rested without presenting any evidence or making any motions.

inquiry as to whether he knowingly and voluntarily consented to this strategy." *Nixon I*, 572 So. 2d at 1339. The Florida Supreme Court found itself unable to resolve this contention (despite a remand for an evidentiary hearing and follow-up instructions to the trial court), *see Nixon I*, 572 So. 2d at 1339–40, and it "decline[d] to dispose of . . . [the issue on a] record which we view as less than complete," leaving Nixon to "raise the issue in a later motion to vacate pursuant to Florida [postconviction procedure]." *Id.* at 1340.

5. Postconviction proceedings

Nixon accordingly raised the issue again in a state postconviction Motion to Vacate Judgment of Conviction and Sentence of Death filed on October 7, 1993 [hereafter, "Motion to Vacate"]. As we describe more fully in footnote 44 below, he pleaded his federal constitutional claims regarding trial counsel's concessions of guilt in the alternative, as a violation of his rights to counsel and to a Due Process trial on his plea of not guilty (under *United States v. Cronic*, 466 U.S. 648 (1984), and *Boykin v. Alabama*, 395 U.S. 238 (1969)) and as one of numerous counts of ineffective assistance of counsel (under *Strickland v. Washington*, 466 U.S. 668 (1984)). He sought an evidentiary hearing on the *Strickland* claim[3] and argued, again in the alternative, that the *Cronic-Boykin* claim could be decided in his favor either with or without taking evidence.[4] The state postconviction judge denied Nixon's motion without an evidentiary hearing on any of his claims, JA. 378–92, and Nixon appealed to the Florida Supreme Court, reiterating all of the arguments he had made in the Motion to Vacate. On that appeal, the Florida Supreme Court upheld his *Cronic-Boykin* claim in an opinion described at

[3] Motion to Vacate at 3.850 R. 465 and 517.

[4] Motion to Vacate at 3.850 R. 455–56.

page 25 and in footnote 43 below, which decided all of the substantive legal issues now before this Court. *Nixon II*, 758 So. 2d at 621–25. The crux of that opinion was that "the dispositive issue in this case is whether Nixon gave his consent to his trial counsel to concede guilt during the guilt phase of the trial." *Id.* at 624. The Florida Supreme Court accordingly "remand[ed] . . . for an evidentiary hearing on this issue," *ibid.*, while declining to address any of the other issues on the appeal, including Nixon's *Strickland* claim. *See Nixon III*, 857 So. 2d at 175 n.5.

On remand, a state circuit judge conducted the hearing. The result, as summarized by the Florida Supreme Court below, was that:

> "On direct examination, trial counsel repeatedly testified that Nixon did nothing when asked his opinion regarding this trial strategy.
>
> "Q: [Nixon's Postconviction Counsel] Did you discuss the strategy of not contesting guilt with the defendant?
>
> "A: [Corin] I thought I answered it. But if I didn't answer it, then yes, he was advised as to that, yes.
>
> "Q: And how did he respond?
>
> "A: To the best of my knowledge, again he did nothing, except after it occurred that he was not real pleased.[5] And I think I answered that before also.

[5] It is unclear whether this refers to an episode that is partly reflected in the transcript of proceedings of July 19, 1985, and elaborated in a newspaper report set out in the postconviction Motion to Vacate. July 19th was the day after Nixon's trial counsel conceded his guilt in opening argument to the jury. The transcript indicates that on the morning of the 19th, Nixon had been brought from jail to the courthouse for a possible return to the courtroom. R. 1990. (There had been some indication from Nixon to the court the preceding afternoon that Nixon was willing to resume attendance at the trial. *See* R. 1992).

> "Q: Now what do you mean by he did nothing?

But before the morning session of the 19th began, defense counsel Corin reported to the judge that Nixon had just informed Corin "that he would rather go back to the jail." R. 1990. The judge asked Corin "What seems to be the nature of his problem?" and Corin—who said that he had had "discussions with him [Nixon] over the last 22 minutes"—replied "I think what occurred yesterday." *Ibid.* The court then took testimony for the record from an officer of the Sheriff's Department, Howard Schleich, who had dealt with Nixon in the holding cell. Schleich testified that:

> "When the indication came to bring the Defendant into the courtroom, we went to the cell to bring him in. He advised at that time that he did not want to come in, he wasn't leaving his cell, that he had read the paper and that it had indicated in there that he was guilty." (R. 1992).

Schleich described Nixon as "somewhat agitated," "standing on the bench that is a seat in the holding cell," "talking loud" (R. 1994), "using profanity," and "fairly vehement that he does not . . . want to come out of the holding cell to come into the courtroom" (R. 1995). During Schleich's testimony, the judge observed that "since coming on the bench I guess in the last five or six minutes . . . , I have heard in the courtroom itself a loud voice, apparently under some volume." R. 1993. He inquired "whether that is Mr. Nixon I am hearing in the courtroom" and was informed by officer Schleich that it was. *Ibid.* By this point, the judge as well as defense counsel plainly understood that counsel's concession of Nixon's guilt was contrary to Nixon's wishes and would be vigorously denounced by Nixon; indeed, the judge reaffirmed his previous ruling that Nixon's trial could proceed in absentia for that very reason:

> "THE COURT: All right. Based on the evidence that I have heard this morning, I'm going to remain of my prior ruling that Mr. Nixon has voluntarily, intelligently and knowledgeably waived his right to attend trial based on the description of his attitude, his present behavior, my apprehension that, should he come into the courtroom, that what would take place would be detrimental to his best interests in this trial. *I am aware, in view of Defense counsel's opening statement yesterday, seeks to place the main emphasis on behalf of his client in the penalty phase of this case and that to compel the attendance of Mr. Nixon at this time would be detrimental to Mr. Nixon's best interest as Defense counsel has mapped out the strategy for his client's best interest.* There-

"A: He did nothing. I don't know. I don't know what else I can say, Mr. Evans. I have said it before.

"Corin further testified that Nixon provided neither verbal nor nonverbal indication that he did or did not wish to pursue counsel's strategy of conceding guilt.[6] . . .

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fore, I would authorize his return back to Leon County Jail." (R. 1995; emphasis added).

The newspaper account, from the *Tallahassee Democrat* of July 20, 1985, is headlined *"Accused killer boycotts trial after hearing about lawyer's statement of guilt"* and reads:

"Finally, Joe Elton Nixon decided to show up for the fifth day of his first-degree-murder trial. But before it was time to step from the holding cell into the courtroom Friday morning, his lawyer handed him the newspaper.

"What Nixon read on the front page of the Democrat sent him cussing and ranting and back to boycotting his trial.

"He read the unique opening statements by Assistant Public Defender Michael Corin: 'In this case, there won't be any question—none whatsoever—that my client caused Jeanne Bickner's death.'

". . . .

"Friday morning, Nixon's loud ranting could be heard by courtroom spectators who waited for the judge to begin the second day of testimony.

"Leon County Sheriff's Deputy Howard Schleich was close by, when Nixon stood on a bench in the holding cell spewing out angry words.

"'He was using profanity and was very vehement in his refusal to go in the courtroom,' said Schleich. 'He wasn't going to go, after reading in the paper that his lawyer said he was guilty.'" (3.850 R. 457 n.12.)

[6] "Corin's testimony essentially mirrored his testimony given at the December 19, 1988, evidentiary hearing, at which Nixon invoked the attorney-client privilege. Thus, both the direct and cross-examination of Corin were extremely limited. Nonetheless, at that hearing Corin testified that Nixon did not affirmatively agree to his concession of guilt. Corin also testified that Nixon did not do or say anything to demonstrate his approval of the trial strategy." *Nixon III*, 857 So. 2d at 176 n.8.

". . . the trial court found that Nixon's pattern of interactions with counsel involved information being provided by Corin, followed by silence from Nixon. In essence, the trial court found that Nixon's failure to approve or disapprove verbally was approval of counsel's strategy." (*Nixon III*, 857 So. 2d at 175–76.)

Nixon again appealed, and the Florida Supreme Court, finding "no competent, substantial evidence which establishes that Nixon *affirmatively* and *explicitly* agreed to counsel's strategy," held that he was entitled to a new trial under its ruling in *Nixon II*. *See Nixon III*, 857 So. 2d at 176 (emphasis added).

6. Questions about the crime not asked until the postconviction stage

Unsurprisingly in a litigation in which the prosecution's theory of the case went unchallenged, Nixon's postconviction pleadings raise questions that the trial record does not satisfactorily answer.

Substantial physical evidence connected Joe Elton Nixon to property of the victim, Jeanne Bickner, taken from her at the time of her murder. He was later seen driving her car. His palm print was on the trunk lid of the car. He pawned some of her jewelry. But this is equally consistent with his involvement in disposing of the proceeds of the robbery as with his involvement in the robbery-murder itself. Plainly, and as the Florida Supreme Court's direct-appeal opinion (pages 2–4 above) relates, the most persuasive evidence that Joe Elton Nixon actually murdered Jeanne Bickner—and that he did so in the manner called for by the prosecution's theory of the case—was:

(A) Joe Elton Nixon's detailed confession;
(B) testimony by his brother John Nixon and by a sometimes girlfriend of Joe's and John's, Wanda Robinson, that Joe Elton Nixon confessed the killing and made other damaging statements to them; and
(C) their description of other incriminatory activity on his part.

The disturbing problems here are that (A) numerous important and unimportant details in Joe Elton Nixon's confession are implausible and inconsistent with the physical facts of the crime; (B) his confession and the stories told by John Nixon and Wanda Robinson are also inconsistent—or waver in and out of alignment as the latter two stories evolve; and (C) there is strong reason to believe that John Nixon was far more deeply involved in the killing of Jeanne Bickner than he or Wanda let on.

- Joe's confession says that he encountered the victim in the parking lot of the Governor's Square Mall and took her to the place where he killed her on a Saturday afternoon. Confession of Joe Elton Nixon, August 14, 1984, Exhibit A of Response to Motion to Vacate Judgment of Conviction and Sentence of Death, filed February 25, 1997 [hereafter, "Confession"] at 3.850 R. 918–19, 920, 953–54. In fact, the abduction and killing occurred on a Sunday.[7] John Nixon and Wanda Robinson initially corroborated Joe's Saturday version[8] but later switched to Sunday.[9]

[7] Bickner was seen alive by at least two witnesses on Sunday, August 12, 1984. *See* the trial testimony of Mary Atteberry, R. 1867–68, and of Linda Gallagher, R. 1871.

[8] *See* Joint Statement of John D. Nixon and Wanda Robinson, given August 14, 1984, Exhibit B of Response to Motion to Vacate Judgment of Conviction and Sentence of Death, filed February 25, 1997 [hereafter, "Joint Statement"] at 3.850 R. 969–71, 974.

(*Footnote 9 appears on the following page*)

- Joe's confession says that in the mall parking lot he told Ms. Bickner that he had a broken muffler on his uncle's Chevrolet Monte Carlo and had hurt his arm, Confession at 3.850 R. 919–20; Ms. Bickner offered him a ride and they left the mall in Bickner's 1973 M.G. two-seat, convertible, with Bickner driving voluntarily and Nixon in the front passenger seat. Confession at 3.850 R. 921, 922, 924. At some point on the road, Nixon says he hit Bickner on the head, overpowered her and—from the passenger side of the car—grabbed the steering wheel and maneuvered the M.G. safely over to the side of the road. He then got the still-conscious Bickner out of the car and forced her into the trunk. Confession at 3.850 R. 924–27.
  - John Nixon and Wanda Robinson both stated that Joe Nixon had told them that he put Bickner in the trunk of the Monte Carlo, not the M.G., in the parking lot of the Governor's Square Mall.[10] John said

[9] Statement of John D. Nixon, given August 16, 1984, Exhibit B of Response to Motion to Vacate Judgment of Conviction and Sentence of Death, filed February 25, 1997 [hereafter, "John Nixon Statement"] at 3.850 R. 1016–17; Deposition of Wanda Robinson, taken February 14, 1985, Exhibit C of Response to Motion to Vacate Judgment of Conviction and Sentence of Death, filed February 25, 1997 [hereafter, "Robinson Deposition"] at 3.850 R. 1120. John Nixon testified on deposition that, in admitting the killing to John, Joe had never told John what day it occurred. Deposition of John Nixon, taken February 14, 1985, Exhibit B of Response to Motion to Vacate Judgment of Conviction and Sentence of Death, filed February 25, 1997 [hereafter, "John Nixon Deposition"] at 3.850 R. 1045.

[10] *E.g.*, John Nixon Statement at 3.850 R. 1007, 1009, 1018; John Nixon Deposition at 3.850 R. 1037; Statement of Wanda Robinson, given August 16, 1984, Exhibit C of Response to Motion to Vacate Judgment of Conviction and Sentence of Death, filed February 25, 1997 [hereafter, "Robinson Statement"] at 3.850 R. 1073; Robinson Deposition at 3.850 R. 1120. In stark contrast to Joe's confession specifying the M.G., John said that Joe had specified the Monte Carlo:

"Q: [T]ell us what he told you [of how the crime happened].

Joe told him that after killing Bickner, he returned to the Mall, parked the Monte Carlo, and then drove back out to the crime scene in the M.G.[11] Wanda said Joe told her that after putting Bickner in the trunk of the Monte Carlo, Joe drove out to Wanda's mother's house with Bickner in the trunk.[12]

- The trunk of a 1973 M.G. is so small that, in order to fit a person into it, the spare tire would have to be removed.[13] This would have required Nixon (if

"A: I will tell you exactly what he told me. He told me that . . . out to Governor's Square Mall [he] parked my uncle's green and white Monte Carlo . . . The lady gave him a boost off and everything and he abducted her and threw her in the trunk of his car.

"Q: The trunk of his car?

"A: Uh huh. (John Nixon Statement at 3.850 R. 1007.)

See also id. at 3.850 R. 1018; Joint Statement at 3.850 R. 976; Robinson Deposition at 3.850 R. 1119–20; Robinson Statement at 3.850 R. 1072. John originally said the same thing in his deposition:

"Q: Put her in the trunk of what car?

"A: In the green and white car.

"Q: Your Uncle Tom's Monte Carlo?

"A: Uh huh." (John Nixon Deposition at 3.850 R. 1037.)

Later, he wobbled on the point. *See infra* note 13.

[11] John Nixon Statement at 3.850 R. 1009. Joe's confession tells the story the other way around: after killing Ms. Bickner, he returned her car to the mall, where the Monte Carlo was parked. Confession at 3.850 R. 938.

[12] Robinson Statement at 3.850 R. 1073–74; Robinson Deposition at 3.850 R. 1120. Wanda Robinson said that her mother had seen Joe driving the Monte Carlo, not the M.G., past her house while her children played out in front, Robinson Statement at 3.850 R. 1073–1074, and that Joe had told Wanda that Bickner was in the trunk of the car at this time, *id.* at 3.850 R. 1073.

[13] As John Nixon testified on deposition:

"A. What I haven't got the right idea on is which car he took the lady out there in. All he said was he put her in the trunk of the car. And I just looked at that little bitty car and I just

the scenario in his confession were true) to single-handedly maintain control over Bickner at the roadside while opening the trunk, removing the spare tire, forcing her into a very small space, and then closing the trunk.

- There are additional reasons why the M.G. scenario is dubious. The crime scene was located in a remote area, at least 1.7 miles from the nearest road (Tram Road) and accessible only by a series of "two-rut" dirt roads.[14] The 1973 M.G. has only four and a half inches of ground clearance, new and unloaded.[15] Four and a half inches is about two-thirds of the *width* of the printed briefs in this Court. Also, the M.G. is an idiosyncratic car. Pho-

figured, you know, he couldn't have took nobody in that little thing. The trunk ain't that big on that."

"Q. Too small to put a person in?

"A. That's what it seems like. I don't know if you could get somebody in there or not." (John Nixon Deposition at 3.850 R. 1039.)

[14] *See* the trial testimony of William Gunter, R. 1902; Directions in Leon County Sheriff's Office Death Investigation Report, August 24, 1984, Appendix to Defendant's Post-Argument Memorandum on the Scope of the Evidentiary Hearing on Defendant's Post-Conviction Claims, Tab M at 3.850 R. 3392–94. Nixon's confession says he drove the M.G. to a logging road and then over the rutted dirt road to the secluded site where Ms. Bickner's body was found. Confession at 3.850 R. 927–28.

[15] *See* "M.G. Series M.G.B. Specifications," M.G.B. Web Page, http://www.mgcars.org.uk/MGB/ mgbspec.html, Appendix to Initial Brief of Appellant and Amended Petition for Writ of Habeas Corpus in the Florida Supreme Court below, Tab 12 at FA. 208. Ms. Bickner's car was an "M.G.B." *See* R. 1871. It probably had even less than four and a half inches of ground clearance because it was over ten years old at the time of the crime and would have had wear on the springs and suspension. Nixon's weight in the car and Bickner's in the trunk, directly over the rear differential and exhaust system, would have brought the car even lower to the ground. Finally, the wheels would likely have slipped into the ruts of the road, bringing the bottom of the car down even lower where the hump rose between the ruts.

tos of the interior of Ms. Bickner's M.G. show a manual transmission in cramped quarters.[16] Joe Nixon could barely drive the M.G. John Nixon said that days after the crime Joe could not get the car into reverse.[17] And Joe was not familiar with the area where body was found.[18]

- The alternative scenario reflected in John Nixon's and Wanda Robinson's statement—that Joe took Ms. Bickner from the mall parking lot by abducting her forcibly in the Monte Carlo—would avoid the difficulties of the M.G. story. But that scenario would require Joe Nixon, a lone black man, to have overpowered Ms. Bickner, a white woman, and forced her into the Monte Carlo's trunk in full view of Sunday afternoon shoppers at the mall. Such a procedure would be far more plausible for two accomplices than for a single actor. We shall see that this sort of abduction was a *modus operandi* that *John* Nixon had previously used alone, but only under less visible conditions.

- Joe Nixon's confession relates that, after having driven Ms. Bickner into a wooded area, he removed her from the trunk of the M.G. and tied her to a tree with two jumper cables from the car. Nixon first said he

16 *See* Appendix to Initial Brief of Appellant and Amended Petition for Writ of Habeas Corpus in the Florida Supreme Court below, Tab 11 at FA. 201.

17 "He tried to get the car in reverse. He couldn't hardly get it in reverse or whatever. He asked me would I show him, help him get it in reverse. I told him just pull it over there and he tried to get it in reverse and the car kept rolling down the hill and he couldn't never get it in reverse." John Nixon Statement at 3.850 R. 1017–18. *See also* Joint Statement at 3.850 R. 987. Yet Joe's confession appears to say that after killing Ms. Bickner, he left the scene by backing her car out. Confession at 3.850 R. 938.

18 "Q: Are you familiar with Tram Road, . . . Joe? ¶ A: Uh, no. ¶ Q: Okay. You ever been down in there before? ¶ A: I been down there when I was younger but you know, I know it's a long ways you know from town and places like that." Confession at 3.850 R. 927. In contrast, the crime scene was in an area where Wanda Robinson's mother had often gone fishing. *See* Joint Statement at 3.850 R. 976.

tied her feet and left hand, using one cable for the feet and the other cable for her hand. He clarified that there were two separate cables.[19] Later, he said that maybe he did tie her around the waist, and that if he did, he guessed it was with a cable.[20] To support that statement, Nixon changed his story, saying he must have loosened her feet, put a bag on her head, put a cable around her waist and then re-tied her feet. Moments later, he changed the story again to say that he never tied Jeanne Bickner's feet.[21] The final story, elicited after police coaching, accords with the crime scene photographs.

- Nixon said he set a fire with some things he found in the M.G., including the "tonneau" cover, a fabric piece that goes over the retracted convertible top. After some conversation with Bickner, he choked her until she died, then threw the burning tonneau cover onto what he thought was her dead body and left the scene.[22] He detailed that he had choked her with a rope she had in her car and that he left it tied around her neck.[23] He said that as he was choking her, he could hear noises like someone "fittin' to drown."[24] But the associate medical examiner who performed the autopsy indicated no signs of a rope, rope marks, or choking: his testimony and his autopsy report both reveal a painstaking examination of the larynx and

19 Confession at 3.850 R. 930–31.

20 Confession at 3.850 R. 959.

21 Confession at 3.850 R. 959–60.

22 Confession at 3.850 R. 932–37.

23 Confession at 3.850 R. 936.

24 Confession at 3.850 R. 937.

adjacent areas which would have revealed any signs of strangulation but found none.[25]

- In his confession, Joe Nixon explained that his reason for killing Jeanne Bickner was that "[she] know me," "[s]he know my name and everything," and he was afraid she was going to tell on him.[26] However, as John Nixon and Wanda Robinson reported Joe's statements to them, he said she was a complete stranger.[27]
- According to Joe's confession, he burned his trousers and shirt at the crime scene because they had blood on them, and he returned to town in his underwear.[28] But Wanda Robinson and John Nixon said that Joe showed them the clothes Joe said he wore when committing the crime;[29] John said they had blood on them

[25] "Well, I did not find any evidence of external or outside injury to the larynx. The larynx is composed of rings of springy cartilage-like material that is fairly easily broken, and all of these were intact. ¶ "There is also a very delicate bone that goes across the larynx just above the region of the Adam's apple . . . . [I]t's a delicate bone that is frequently fractured in this area in the case of injuries. And that bone was intact." R. 1949–50. *See also* Autopsy Report, August 14, 1984, Exhibit F of Response to Motion to Vacate Judgment of Conviction and Sentence of Death, filed February 25, 1997 at 3.850 R. 1287.

[26] Confession at 3.850 R. 938. He had originally denied knowing Ms. Bickner (or at least her last name), *id.* at 3.850 R. 918, but then said: "She knows me. She knows my name and everything . . . . Well, she just, or something, up on campus, you know, I be up on Florida State or something. I think she was a teacher or something," *id.* at 3.850 R. 921.

[27] John Nixon told the police that Joe "told me he didn't know the woman at all. . . . She was a complete stranger to him." John Nixon Statement at 3.850 R. 1020. Wanda Robinson concurred: "I asked him who was it [sic] and he said he didn't know." Robinson statement at 3.850 R. 1073.

[28] Confession at 3.850 R. 954–56.

[29] Joint Statement at 3.850 R. 970–71, 973–74; John Nixon Statement at 3.850 R. 1001–02, 1017; John Nixon Deposition at 3.850 R. 1030, 1043; Robinson Statement at 3.850 R. 1076–78; Robinson Deposition at 3.850 R. 1114, 1115–16.

and that he, John, had thrown Joe's blood-stained shirt in the garbage can (where, he asserted, it still was at the time of John's statement to the police), while Joe "took the pants with him."[30]

- There are indications in Wanda Robinson's deposition that she had originally considered John Nixon a likely suspect in the Jeanne Bickner murder—whether in addition to Joe or instead of Joe is unclear[31]—and that the police discouraged her from taking that line.[32] These indications become the more troubling in the light of deposition testimony that Wanda gave in a subsequent civil action brought by Jeanne Bickner's estate against the Governor's Square Mall. She testified that, a year before the Bickner murder, John Nixon had kidnapped her from the Mall by beating her, choking her and throwing her into a car—a procedure very much like the abduction of Jeanne Bicker under any account of the latter, except that John had accomplished it early in the morning, before the mall stores opened.[33] Several months before Joe Nixon's trial, Robinson said, John Nixon again abducted her in a

[30] Joint Statement at 3.850 R. 970–71.

[31] Robinson Deposition at 3.850 R. 1155: "And I was telling him [Detective Paul Phillips] like, 'How do you know John didn't have anything to do with killing this woman?' And, 'You've got Joe in jail, why don't you put John in jail?'"

[32] Robinson Deposition at 3.850 R. 1155–56: "And he [Detective Phillips] said, 'Wanda, you talking crazy. You need to shut up. You know John couldn't have killed the woman because John was with you,' you know, and all of that. Which John was with me that Saturday and that Sunday. ¶ And he just told me, you know, 'You are not supposed to be talking about the case. So, just drop it, you know. Go ahead with your life.'"

[33] *See* Deposition of Wanda Huggins McKinney in *Roberts v. Governor's Square, Inc.*, Appendix to Initial Brief of Appellant and Amended Petition for Writ of Habeas Corpus in the Florida Supreme Court below, Tab 34 at FA. 393–404, 411–15.

similar fashion.[34] In all, John had abducted and assaulted her four times,[35] driving her around in a car and beating her on three of these occasions.[36] Robinson said that she always called the police or the sheriff about the abductions but they wouldn't do anything about it because John was a snitch;[37] Wanda learned he was a snitch after he snitched on Joe.[38]

SUMMARY OF ARGUMENT

This is not a case about a lawyer's decision to concede guilt in order to preserve credibility with the jury at sentencing. It is a case about a lawyer's decision to adopt that tactic and to implement it in the client's absence, without adequately consulting the client. When the lawyer proceeded in this manner—failing to take the necessary steps to protect the client's interest in deciding for himself whether to exercise or forgo his constitutional right to hold the prosecution to its burden of proof beyond a reasonable doubt—counsel not only subverted that right but fatally undermined the adversary structure of the trial process.

First, counsel's unilateral concession of guilt was no different than a guilty plea in any material respect. A solid line of precedent in this Court, through and including *Roe v. Flores-Ortega* supports the propositions that (1) the accused, not defense counsel, controls the decision whether to contest or concede guilt; (2) counsel has the duty to make a reasonable effort to ascertain his client's wishes in that regard and cannot unilaterally elect to

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[34] *Id.* at 404.

[35] *Id.* at 393–94, 396, 400.

[36] *Id.* at 391, 406, 416–21.

[37] *Id.* at. 406–10.

[38] *Id.* at. 409.

forgo his client's right to a Due Process trial upon the client's plea of not guilty; and (3) if that duty is breached, the client is entitled to postconviction relief upon showing a reasonable probability that he would have chosen to hold the prosecution to its burden of proof. Under the circumstances of this case—involving a client tried *in absentia*—the consultation was inadequate, the client's choice of plea was undermined, and there is more than the requisite showing that the client would not have elected to concede guilt if his wishes had been adequately ascertained and respected.

Second, the effective performance of capital defense counsel benefits not just the accused, but the justice system as a whole, including all appellate courts. To perform effectively, defense counsel must "require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if the defense may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Cronic*, 466 U.S. at 656–57 (footnote omitted). When the defense lawyer in this case decided to assist the prosecution in obtaining Mr. Nixon's conviction without Mr. Nixon's consent—whatever counsel's good intentions and however "reasonable" his strategy—the trial lost its adversarial character and Mr. Nixon was deprived of the "Assistance of Counsel for his defence."

(This is a different claim and presents a wholly different issue than the *ineffective*-assistance-of-counsel claim that Nixon presented *in the alternative* in his motion for postconviction relief. That *Strickland* issue was reserved by the Florida Supreme Court; it remains evidentially undeveloped on this record; and the efforts of the State

and its *amici* to conflate it with the issues on which the Florida Supreme Court below granted Nixon relief—and which this Court has granted *certiorari* to review—are quite improper.)

ARGUMENT

Introduction: Putting Spurious Issues Aside

Florida and its *amici* address their briefs to issues that this case does not present. They start from the erroneous premise that the Florida Supreme Court held the Sixth Amendment to the Constitution had been violated when Nixon's trial lawyer conceded Nixon's guilt in opening and closing arguments to the jury. From this premise they reason that the question whether counsel's argument violated Nixon's Sixth Amendment rights should be governed by the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984). Dwelling on the first prong, they urge that counsel's choice of jury arguments did not constitute substandard performance because it was "reasonable"—a tactical election within the range of those that a competent attorney might agree with. Dwelling on the second prong, they urge that Nixon was not prejudiced by the choice. Pertinent to both prongs, they argue extensively that the prosecution's case for guilt was strong.

This entire structure is built upon a fallacious foundation. The Florida Supreme Court did not hold that Nixon's Sixth Amendment rights were violated when his lawyer conceded Nixon's guilt in jury argument. It held that Nixon's Sixth Amendment and Due Process rights were violated when his lawyer *failed to obtain Nixon's consent before* conceding his guilt in jury argument.[39]

[39] *See Nixon II*, 758 So. 2d at 623 ("if Nixon did consent to trial counsel's strategy, then it could not be said that trial counsel was ineffective, and Nixon would not be entitled to relief on this claim"; "the dividing line between a sound defense strategy and ineffective assistance of counsel is whether or not the client has given his or her consent to such a strategy"; "[a]lthough an attorney has the right to make tactical decisions regarding trial strategy, . . . the determination to plead guilty or not guilty is a matter left completely to the defendant"); *id.* at 625 ("Although the attorney can make some tactical decisions, the ultimate choice as to which direction to sail is left up to the defendant. The question is not whether the route taken was correct; rather, the question is whether Nixon approved of the course."); *id.* at 624 ("Thus, the dispositive issue in this case is whether Nixon gave his consent to his trial counsel to concede guilt during the guilt phase of the trial.").

The Florida Supreme Court did not decide whether counsel's jury argument was "reasonable" or whether it was prejudicial to Nixon. It did not do so because it did not reach Nixon's claims of ineffective assistance under *Strickland v. Washington*, including his *Strickland* claim based on counsel's concession of guilt. In its first postconviction decision in Nixon's case, in 2000, the Florida Supreme Court reserved decision on his *Strickland* claims.[40] It held that "[b]ecause counsel's comments were the functional equivalent of a guilty plea," Nixon was entitled to an evidentiary hearing on the question whether "there was . . . an affirmative, explicit acceptance by Nixon of counsel's strategy" (*Nixon II*, 758 So. 2d at 624), and it remanded for such a hearing. On the remand, the hearing was limited to that specific issue.[41] On the second postconviction appeal,

[40] *See Nixon III*, 857 So. 2d at 175 n.5: "This Court [in *Nixon II*] declined to address the remaining issues in Nixon's 3.850 appeal." *And see id.* at 172 n.2 (summarizing those issues, including the question raised by Nixon "whether the circuit court denied him a full and fair hearing on his ineffective assistance of counsel claim").

[41] The Circuit Court began the hearing by stating that its "understanding from the [Florida] Supreme Court's opinion is that we are here to determine one issue and one issue only." JA. 434. It defined that issue as whether "Mr. Nixon did not give . . . his attorney consent to, as the Supreme Court has framed it, enter a guilty plea or to agree to allow his attorney to undertake a trial strategy in which guilt would be determined." *Ibid.* Nixon's postconviction counsel affirmed

resulting in the decision now before this Court for review, the Florida Supreme Court again found it unnecessary to

that that was their understanding. JA. 434–35. Counsel for the State asserted that he wanted to develop a sufficiently full record so that he could "preserve our legal issue" (JA. 437) as to whether the Florida Supreme Court had wrongly applied *Cronic* rather than *Strickland* to Nixon's claim concerning his trial lawyer's concession of guilt. JA. 435–37. The court replied "although the issue is pretty much narrowed by the Supreme Court's opinion, I think in terms of developing a record it would be appropriate to inquire maybe a little beyond the bounds of that specific issue of [Nixon's] agreement [to counsel's concession]." JA. 437–38. Nixon's attorneys pointed out that they had raised separate *Cronic* and *Strickland* claims, and that the Supreme Court's remand had to do only with the *Cronic* claim. JA. 438. The court inquired "what ineffectiveness claims you . . . would argue should not be addressed." JA. 439. Nixon's attorneys replied that "[t]here are guilt phase ineffective assistance claims under Strickland which would, of course, require the two-prong showing of inadequacy and prejudice" (JA. 439), and asserted: "if we are going to have a hearing on that, Your Honor first of all we ought to have had notice of that. And second of all, one day would never do it. If we knew that that was the case, we would have asked Your Honor for much more time. This is a total surprise to use [sic] that the State wants to inquire into this stuff." *Ibid.* State's counsel explained that his aim was solely to preserve the issue "whether Cronic applied or whether Strickland applied" and that the State had a "legal right to develop a correct record." JA. 439-40. Nixon's attorneys replied that "if anybody is going to be denied their legal right if you proceed according to their [the State's] plan [to expand the hearing beyond the *Cronic* issue], it will be our denial of a legal right to develop a full evidentiary hearing on our Strickland claim." JA. 440; *see also* JA. 440–42. State's counsel clarified that "I am not talking about whether you would consider it ineffective in his failure to present a competency defense or anything like that. I am talking about, develop what Mr. Corin did leading up to the decision that he came to to [sic] not litigate the guilt issue and the facts and circumstances surrounding that decision. ¶ Because, otherwise, I am going to get up there, and I'm not going to have any evidence to present that the issue was to be decided under a Strickland prejudice test rather than Cronic." JA. 443. The court observed that "perhaps we are making a little mountain out of a mole hill here. What I am hearing from . . . [State's counsel] is perhaps some latitude in development of the record on this claim as I've articulated. ¶ And

reach any other issue.[42] The only issue it decided, and the only issue now before this Court, is whether trial counsel's failure to obtain Nixon's consent before conceding in opening and closing jury argument that his client was guilty of capital murder constituted a *per se* violation of Nixon's Sixth and Fourteenth Amendment rights.[43]

I, certainly, will provide the State with that opportunity. I want to fully provide—or to provide a full record and as complete as possible in regard to everything having to do with the development of the trial strategy and the discussions that occurred there between Mr. Corin [Nixon's trial counsel] and Mr. Nixon." JA. 443. The court concluded that "I think we are all in agreement at this point, and I think we are safe to proceed" (JA. 444); and the hearing went forward on that footing.

[42] "The dispositive issue is whether Nixon is entitled to a new trial under this Court's decision in *Nixon II*." *Nixon III*, 857 So. 2d at 175.

[43] The Florida Supreme Court found that Nixon had been denied two related rights protected by the federal constitutional guarantee of due process: the right to a trial on his plea of not guilty, and the right to have counsel's assistance in holding the prosecution to its burden of proof once Nixon had elected to enter that plea:

> "In addition to the right to effective assistance of counsel, 'the Due Process Clause [of the Fourteenth Amendment] protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" (*Nixon II*, 758 So. 2d at 621.)
>
> "[T]he determination to plead guilty or not guilty is a matter left completely to the defendant. *See Jones v. Barnes*, 463 U.S. 745, 751. . . (1983) . . . ; *Brookhart v. Janis*, 384 U.S. 1 . . . (1966) (stating that . . . the Due Process Clause does not permit an attorney to admit facts that amount to a guilty plea without the client's consent). At his arraignment, Nixon entered a 'not guilty' plea. By pleading 'not guilty,' Nixon exercised his right to make a statement in open court that he intended to hold the State to strict proof beyond a reasonable doubt as to the offenses charged. . . . 'Unquestionably, the constitutional right of a criminal defendant to plead 'not guilty,' or perhaps more accurately not to plead guilty, entails the obligation of his attorney to structure the trial of the case around his client's plea.'" (*Nixon II*, 758 So. 2d at 623–24.)

Florida's and its *amici*'s efforts to import a *Strickland* issue into the case are distracting, procedurally inapt, and grossly unfair. When Mr. Nixon's state postconviction motion was originally filed, his postconviction counsel *did* proceed on a *Strickland* theory *cast in the alternative* to the theory on which the Florida Supreme Court subsequently gave him relief.[44] Under their *Strickland* theory,

> "[T]his Court has stated that '[d]ue process requires a court accepting a guilty plea to carefully inquire into the defendant's understanding of the plea, so that the record contains an affirmative showing that the plea was intelligent and voluntary.' . . . ¶ Because counsel's comments were the functional equivalent of a guilty plea, we conclude that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy." (*Nixon II*, 758 So. 2d at 624.)
>
> "In *Nixon II*, we found that counsel's comments at trial were the functional equivalent of a guilty plea. Since counsel's comments operated as a guilty plea, in order to affirm the trial court's ruling, the record must contain substantial evidence which would enable this Court to determine that Nixon did more than silently submit to counsel's strategy. There is no evidence that shows that Nixon affirmatively, explicitly agreed with counsel's strategy." (*Nixon III*, 857 So. 2d at 176.)

[44] Nixon's Motion to Vacate pleaded the *Cronic-Boykin* claim on which the Florida Supreme Court below later ruled in his favor as Claim II ("Defense Counsel's Concession of Guilt Without an Express Waiver by Mr. Nixon on the Record Constituted Ineffective Assistance of Counsel *Per Se* Under *United States v. Cronic*") at 3.850 R. 444–58. (The *Boykin* aspect of the claim appears at 3.850 R. 453–54.) The Motion pleaded an alternative *Strickland* claim based on the same concession in Claim V.B ("Mr. Nixon was Deprived of the Effective Assistance of Counsel when His Lawyer Conceded his Guilt to the Jury") at 3.850 R. 468–70. The *Strickland* version of the claim was one of 22 specifications of trial counsel's ineffective assistance at the guilt stage of the trial (3.850 R. 465–517) which the petition urged be considered as mutually compounding (3.850 R. 465) and on which it requested an evidentiary hearing (3.850 R. 465, 517). The petition twice recited that the *Cronic-Boykin* and *Strickland* versions of the claim were alternative and independent (3.850 R. 458, 470), and it explicitly stated that if the court did not find the *Cronic-Boykin* version of the claim established on the face of the trial record, Nixon was entitled to an evidentiary hearing on the *Strickland* version "at which Mr. Nixon will establish that under *Strickland*, counsel was constitutionally ineffective and that Mr. Nixon was substantially prejudiced thereby." 3.850 R. 458.

they sought a hearing at which they could show that the appearance of Nixon's guilt and of the "strong prosecution case" so prominently featured in the briefs of Florida and its *amici* are artifacts of a record distorted and impoverished *because* trial counsel chose not to contest the prosecution's case of guilt and its underlying factual scenario depicting Joe Elton Nixon as the lone perpetrator of the murder of Jeanne Bickner. The original state postconviction judge denied them a hearing on their *Strickland* claims;[45] they appealed that denial to the Florida Supreme Court; and their assertion of a right to be heard on facts relevant to any proper *Strickland* adjudication remains unresolved by the Florida Supreme Court because that Court invalidated Nixon's conviction on a theory which made these facts irrelevant.[46]

For the State and its supporters now to call for a *Strickland* analysis based on the proposition that this is a "capital case in which the evidence of guilt was overwhelming" (Pet. Br. at 21) is disingenuous at best. And the maneuver is made still more devious by talking about the evidence of "guilt" being "overwhelming" *without* noting that the same evidence irresistibly cried out for a death sentence *if* Nixon did commit the crime in the way the prosecution

[45] Order dated October 22, 1997. JA. 378–92.

[46] *See Nixon II*, 758 So. 2d at 619 n.1, describing the claims raised by Nixon on appeal and left unresolved, including "(1) the circuit court denied him a full and fair hearing on his ineffective assistance claim"; *Nixon III*, 857 So. 2d at 173 n.2 (same).

contended and his lawyer conceded, for surely this is a consideration relevant to *Strickland* analysis that Nixon would be entitled to argue in the first instance to Florida judges familiar with the sentencing penchants of Florida juries if his case were reconfigured so that his alternative *Strickland* theory was turned into his *sole* constitutional claim, as the State and its *amici* now seek to do.

Inasmuch as this Court has repeatedly advised the Bar that "we do not decide in the first instance issues not decided below" (*Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999)), Mr. Nixon's brief will respect that limitation. *See, e.g., Smith v. Robbins*, 528 U.S. 259, 284–85 (2000) (remanding for the lower court to adjudicate an ineffective-assistance-of-counsel claim under *Strickland* standards after holding that that court had erred in employing a different standard); and *e.g., Gilbert v. Homar*, 520 U.S. 924, 935–36 (1997); *Wright v. West*, 505 U.S. 277, 297 (1992) (plurality opinion of Justice Thomas). In Part I below, we discuss the correctness of the Florida Supreme Court's holding that Mr. Nixon was denied the right to stand trial upon his plea of not guilty.[47] In Part II, we discuss the correctness of its holding that he was also denied the Sixth Amendment right to the assistance of counsel, because his lawyer "'entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing.'"[48]

[47] *See supra* note 43; *and see Nixon III*, 857 So. 2d at 174, 176.

[48] *Nixon II*, 758 So. 2d at 622, quoting *United States v. Cronic*, 466 U.S. 648, 659 (1984); *see Nixon III*, 857 So. 2d at 174.

I. The Florida Supreme Court Correctly Held that Mr. Nixon Was Denied His Right to Contest His Guilt at a Trial Conducted in Accordance with His Plea of Not Guilty

Four principal precedents of this Court combine to establish that Mr. Nixon enjoys the constitutional right vindicated by the Florida Supreme Court in this case: the right to a trial conducted in a manner consistent with his plea of not guilty, unless he personally elects to forgo such a trial. Three of those precedents—*Jones v. Barnes*, 463 U.S. 745 (1983), *Boykin v. Alabama*, 395 U.S. 238 (1969), and *Brookhart v. Janis*, 384 U.S. 1 (1966)—were relied upon by the Florida court to inform its decision. *Nixon II*, 758 So. 2d at 623–24. The fourth—*Roe v. Flores-Ortega*, 528 U.S. 470 (2000)—was handed down about a month after the decision in *Nixon II* and fully confirms the Florida court's reading of the earlier precedents.

In *Jones v. Barnes* the Court's opinion by Chief Justice Burger recognized that a criminal defendant, and not his or her attorney, "has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." 463 U.S. at 751; *see also id.* at 753 n.6. The Court had earlier so held implicitly, in the case of a guilty plea;[49] *Jones* made the rule explicit; and

[49] *See Henderson v. Morgan*, 426 U.S. 637 (1976), holding that a guilty plea entered by a state criminal defendant who was represented by counsel must be set aside upon a showing that the defendant had been misinformed regarding the *mens rea* element of the offense charged. The Court did not suggest that *counsel* was misinformed, that counsel's decision to broker the plea was strategically ill-advised or unreasonable, or that counsel had performed ineffectively in any other way than by failing to assure that his client personally made an intelligent and understanding choice to plead guilty. Plainly, *Henderson* was bottomed on the principle that the choice was the defendant's alone, not counsel's.

Jones has since been regarded by the Court as authoritative on the point. *See, e.g., Roe*, 528 U.S. at 577; *Rock v. Arkansas*, 483 U.S. 44, 53 n.10 (1987).

Boykin, of course, stands for the proposition that a guilty plea is not constitutionally valid unless the record affirmatively shows that the defendant personally made an understanding and voluntary waiver of the right to a Due Process trial, with knowledge of the rights s/he was putatively waiving. *Boykin*, 395 U.S. at 243–44. That, too, remains unquestioned constitutional doctrine today. *See, e.g., United States v. Dominguez Benitez*, 124 S. Ct. 2333, 2341 n.10 (2004).

The teaching of *Brookhart* is that the application of these principles is not limited to technical, formal pleas of guilty, but extends to procedures that are the functional equivalent of a guilty plea in that they involve a surrender of the right to contest the prosecution's factual case on the issue of guilt or innocence. In *Brookhart*, a defendant's lawyer agreed to a locally recognized procedure known as a "prima facie trial." This Court held that that procedure—under which the defendant could not be convicted unless the prosecution presented sufficient evidence to support a finding of guilt but in which the defendant refrained from challenging the prosecution's case in any way—could not constitutionally be used to convict a defendant who had not personally assented to it. Defense counsel's assent—wise or unwise, reasonable or unreasonable, harmful or helpful to the defendant—was insufficient.

> "By agreeing to this truncated kind of trial—if trial it could be called—we can assume that the lawyer knowingly agreed that the State need make only a prima facie showing of guilt and that he would neither offer evidence on petitioner's behalf nor cross-examine any of the State's witnesses. The record shows, however, that petitioner himself did not intelligently and knowingly agree to be tried in a proceeding which was the equivalent of a guilty plea and in which he would not have the right to be confronted with and cross-examine the witnesses against him. His desire not to agree to such a trial is shown by the fact that immediately after the judge accurately stated that in a prima facie case the defendant 'in effect admits his guilt,' Brookhart personally interjected his statement that 'I would like to point out in no way am I pleading guilty to this charge.' Although he expressly waived his right to a jury trial, he never, at any time, either explicitly or implicitly, pleaded guilty. His emphatic statement to the judge that 'in no way am I pleading guilty' negatives any purpose on his part to agree to have his case tried on the basis of the State's proving a prima facie case which both the trial court and the State Supreme Court held was the practical equivalent of a plea of guilty. Our question therefore narrows down to whether counsel has power to enter a plea which is inconsistent with his client's expressed desire and thereby waive his client's constitutional right to plead not guilty and have a trial in which he can confront and cross-examine the witnesses against him. We hold that the constitutional rights of a defendant cannot be waived by his counsel under such circumstances." (*Brookhart*, 384 U.S. at 6–7.)

This holding of the Court, no less than those in *Jones v. Barnes* and *Boykin*, has stood the test of time. *See, e.g., Brewer v. Williams*, 430 U.S. 387, 404 (1977); *Taylor v. Illinois*, 484 U.S. 400, 418 n.24 (1988); *New York v. Hill*, 528 U.S. 110, 114 (2000).

Contemporaneously with the Florida Supreme Court's reliance on these precedents below, this Court recon-

firmed their core principles and explored the resulting obligations of counsel in *Roe v. Flores-Ortega*. The *Roe* opinion demonstrates that the Florida Supreme Court framed the inquiry in the present case correctly and that the State of Florida and its *amici* have framed it incorrectly. For, like the Florida Supreme Court, *Roe* focuses *not* upon whether counsel's decision to forgo the exercise of a criminal defendant's right to a trial (or, in *Roe*, an appeal) is unreasonable and prejudicial, but on whether counsel has acted unreasonably and prejudicially in failing to safeguard *the defendant's right to make that decision personally and advisedly*. (The distinct *Strickland* issue, which, as we have noted above, is not now before the Court and would require additional evidentiary development,[50] is whether counsel's *advice* to the defendant to forgo the right was unreasonable and prejudicial. *See, e.g., Tollett v. Henderson*, 411 U.S. 258 (1973).)

In other words, where the sort of basic right identified in *Jones*, *Boykin*, and *Brookhart* is in question, analysis does not proceed by asking whether counsel made a reasonable judgment to abandon the right, but "by first asking a separate, but antecedent, question: whether counsel . . . consulted with the defendant about [exercising that right]." 528 U.S. at 478. "Consultation," as *Roe* uses the term to reflect the teaching of the earlier cases, means not only "advising the defendant about the advantages and disadvantages of" exercising the right in question, but also "making a reasonable effort to discover the defendant's wishes." *Ibid*. This "constitutionally imposed duty to consult with the defendant" arises whenever "there is reason to think either (1) that a rational defendant would want to . . . [exercise the right], or (2) that this particular defendant reasonably demonstrated to counsel that he

[50] *See supra* notes 44–46 and accompanying text.

was interested in . . . [exercising the right]." *Id* at 480. If *either* of these conditions exists and defense counsel has *either* failed to advise the defendant or failed to make "a reasonable effort to discover the defendant's wishes," the defendant is entitled to postconviction relief upon a showing "of prejudice from counsel's deficient performance." *Id*. at 481. The test of prejudice is whether "there is a reasonable probability" that the defendant would have chosen to exercise the right if adequately consulted. *Id*. at 485.

In deciding Mr. Nixon's case, the Florida Supreme Court did not use the identical terminology that was used in this Court's *Roe* opinion a month later. But its basic analysis was no different than *Roe*'s. It started from the same premise as *Roe*—the recognition in *Jones v. Barnes* that "'the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.'" *Nixon II*, 758 So. 2d at 623. *See also Roe*, 528 U.S. at 577 (reading *Jones* as holding that the "'accused has ultimate authority to make [the] fundamental decision whether to take an appeal'"). That starting point led the Florida Supreme Court, like *Roe*, to concentrate on whether the defendant's lawyer had done an adequate job of ascertaining the defendant's wishes with regard to the fundamental decision in question—which, in Nixon's case, was the decision whether to "hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt." *Nixon II*, 758 So. 2d at 625. *See also id*. at 623. Nixon had displayed an interest in contesting the prosecution's case for a conviction of first-degree murder when, "[a]t his arraignment, . . . [he] entered a 'not guilty' plea." *Ibid*. "By pleading 'not

guilty,' Nixon exercised his right to make a statement in open court that he intended to hold the State to strict proof beyond a reasonable doubt as to the offenses charged." *Ibid. See also id.* at 623. In *Roe*'s terminology, Nixon thereby "reasonably demonstrated to counsel that he was interested in" putting the prosecution to its proof. *Roe*, 528 U.S. at 480. Nixon's not-guilty plea, his manifest rage at learning about counsel's concession of guilt (*see* note 5 above), and the manifest availability of grounds for attacking the prosecution's theory of the case (*see* pages 13–22 above) are more than sufficient to demonstrate that, for purposes of *Roe*'s prejudice component, "'there is a reasonable probability that . . . [Nixon] would have insisted on going to trial'" if his wishes had been consulted. 528 U.S. at 485. Within *Roe's* analytic framework, then, the only real controversial issue was whether Nixon's counsel had failed to make "a reasonable effort to discover the defendant's wishes," *Roe*, 528 U.S. at 478; and the Florida Supreme Court concluded that he had, because Nixon's "[s]ilent acquiescence is not enough." *Nixon II*, 758 So. 2d at 624.

> "There is no evidence that shows that Nixon affirmatively, explicitly agreed with counsel's strategy. The only evidence presented at the evidentiary hearing was Corin's testimony, which indicated that Nixon neither agreed nor disagreed with counsel's trial strategy. Thus, there is no competent, substantial evidence which establishes that Nixon *affirmatively* and *explicitly* agreed to counsel's strategy. *Without a client's affirmative and explicit consent to a strategy of admitting guilt to the crime charged or a lesser included offense, counsel's duty is to 'hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt.' Nixon II*, 758 So. 2d at 625 (emphasis added). Since we held in *Nixon II* that silent acquiescence to counsel's strategy is not sufficient, we find that Nixon must be given a new trial." (*Nixon III*, 857 So. 2d at 176.)

In many cases—and certainly in the ordinary case, "where the circumstances are not 'exceptional,'" *Brookhart*, 384 U.S. at 7—the Florida Supreme Court's ruling that "silent acquiescence is not sufficient" would probably demand too much of counsel under *Roe*'s subsequently announced standard that counsel's duty is to make "a reasonable effort to discover the defendant's wishes." *Roe*, 528 U.S. at 478. But *Roe* itself reminds us repeatedly that "'[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel." *Id.* at 477. *See also id.* at 478, 480. Nixon's own case is one in which the circumstances *are* exceptional; and in this exceptional case at least, the Florida Supreme Court's demand for more than "silent acquiescence" is entirely consistent with *Roe*.

Nixon was tried *in absentia*. In the ordinary case, where a criminal defendant is present with counsel throughout the trial proceedings, it is commonplace and may be perfectly proper to infer from his or her attendance without objections that s/he has been sufficiently consulted and assents to counsel's basic manner of conducting the defense. Under these circumstances, silent acquiescence may well be sufficient. But when the defendant is absent from the courtroom at the time counsel proceeds to "make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, [or waive the defendant's right to] testify

in his or her own behalf,"[51] the defendant's assent to counsel's decision cannot properly be assumed or inferred. And this is so whether or not the court's determination to hold the trial in the defendant's absence was legally permissible, as we must assume at the present stage of this case that it was (although this, too, is an issue raised by Mr. Nixon's state postconviction petition that remains unresolved by the Florida Supreme Court).[52] Surely if, despite the propriety of Nixon's trial *in absentia* on his plea of not guilty, counsel had announced at the conclusion of jury selection that he was changing Mr. Nixon's plea to guilty and consenting to the entry of a judgment convicting Mr. Nixon of capital murder, this Court's precedents from *Jones v. Barnes* through *Roe v. Flores-Ortega* would not countenance the entry of such a judgment of conviction without bringing Mr. Nixon into court and inquiring whether the decision to change his plea was one that he assented to.[53]

The present case stands on no different footing: counsel's concession of Nixon's guilt in opening and closing statements made without Nixon's express assent and in his absence falls squarely within the condemnation of these precedents and particularly the ruling in *Brookhart*

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[51] *Jones*, 463 U.S. at 751.

[52] The Florida Supreme Court held on Nixon's direct appeal that the trial court had properly found that Nixon consented to be tried *in absentia*. *Nixon I*, 572 So. 2d at 1341–42. But Nixon's postconviction motion alleged that that finding was made without a constitutionally required inquiry into Nixon's mental competence (Motion to Vacate at 3.850 R. 419–40), and this issue is among those that the Florida Supreme Court left undecided when it vacated Nixon's conviction on the ground of his lawyer's unauthorized concession of guilt. *See Nixon II*, 758 So. 2d at 619 n.1, item (2); *Nixon III*, 857 So. 2d at 173 n.2, item (2).

[53] In fact, of course, Nixon expressed his lack of assent in the only way he knew how. *See supra* note 5.

that "the constitutional rights of a defendant cannot be waived by his counsel under such circumstances." *Brookhart*, 384 U.S. at 7.

Florida and its *amici* argue, however, that defense counsel's concession of the defendant's guilt in jury argument is different from a formal plea of guilty in a number of technical and theoretical respects, the foremost being that such a concession does "not relieve the State of its burden to present evidence or to prove guilt beyond a reasonable doubt": "the State was obliged to (and did) present evidence that was not merely legally sufficient to convict, but also sufficiently credible and weighty to convince the jury of Nixon's guilt beyond a reasonable doubt." (Pet. Br. at 30). With respect, these arguments reek of the lamp. No one having the least experience with real juries in real courtrooms could seriously imagine that any jury will acquit a defendant after his or her lawyer has told it that s/he is guilty—let alone if his or her lawyer, like Nixon's lawyer, tells the jury that s/he is guilty in both opening and closing argument, presents no evidence, and does not cross-examine any of the state's witnesses, except to ask a few perfunctory, clarifying questions. It is true, to be sure, that despite defense counsel's concession of guilt, the trial *judge* might direct a verdict of acquittal if the prosecution failed to present sufficient evidence to support a verdict of guilty. But that, of course, was equally the case—indeed, it was the whole point of the "prima facie trial" procedure—in *Brookhart v. Janis*; and this Court nonetheless invalidated Brookhart's conviction on the ground that his lawyer could not, without Brookhart's personal assent, constitutionally agree to a form of trial "which both the trial court and the State Supreme Court held was the practical equivalent of a plea of guilty." *Brookhart*, 384 U.S. at 7.

Here the Florida Supreme Court similarly found that "counsel's comments were the functional equivalent of a guilty plea." *Nixon II*, 758 So. 2d at 624. *See also Nixon III*, 857 So. 2d at 176. Its invalidation of Nixon's conviction on the further finding that "[t]here is no evidence that shows that Nixon affirmatively, explicitly agreed with counsel's strategy," *ibid.*, was therefore thoroughly in keeping with *Brookhart* and this Court's other precedents from *Jones* through *Flores-Ortega*.

That is a sufficient ground for affirmance of the judgment below. But an additional consideration bolsters the case for affirmance. The decision of the Florida Supreme Court that the rule it announced in *Nixon II* and enforced in *Nixon III* is required to protect the federal constitutional right of Florida criminal defendants to make "the ultimate choice" whether or not to "hold the State to its burden of proof by clearly articulating to the jury or factfinder that the State must establish each element of the crime charged . . . beyond a reasonable doubt"[54] deserves this Court's respect.

Because the right at issue *is* federal, this Court has undoubted authority to define its contours. But that is not to say that the Court should supervise every decision by a state court regarding the ancillary procedures needed to protect the right under the conditions of criminal practice that exist in that State's courts. A State's highest court is more familiar with those conditions—with the prevalent practices and penchants of the state's criminal bar, its trial judges, and its juries, and with the practicalities and costs of recourse to appellate review for correction of problems at the trial level—than this Court can possibly be. Given that familiarity, it may see the need to insist on strict rules for the way in which criminal attorneys perform the duty of consultation recognized in

[54] *Nixon II*, 758 So. 2d at 625.

Roe—the duty of "advising the defendant about the advantages and disadvantages of . . . [exercising a particular right] and making a reasonable effort to discover the defendant's wishes"[55]—that go beyond the minimum requirements which this Court is prepared to impose on all of the 50 States.[56] Several individual States' highest courts, in addition to Florida's, have adopted rules requiring a defendant's consent before defense counsel may concede his or her guilt in jury argument.[57] These requirements differ in stringency and in the means by which they are enforced,[58] although all of them were ini-

[55] *Roe*, 528 U.S. at 478.

[56] The Florida Supreme Court, for example, saw fit to enforce *Boykin v. Alabama* in the Florida courts by a rigorous requirement that a court accepting a guilty plea must "carefully inquire into the defendant's understanding of the plea, so that the record contains an affirmative showing that the plea was intelligent and voluntary." *Koenig v. State*, 597 So. 2d 256, 258 (Fla. 1992). In *Nixon II*, it referenced *Koenig* as well as *Boykin* in insisting upon "an affirmative, explicit acceptance by Nixon of counsel's strategy" as the precondition for counsel's concession of Nixon's guilt and in announcing, "in order to avoid similar problems in the future," that "if a trial judge ever suspects that a similar strategy is being attempted by counsel for the defense, the judge should stop the proceedings and question the defendant on the record as to whether or not he or she consents to counsel's strategy." *See* 758 So. 2d at 624–25. The *Nixon II* protocols represent a studied judgment by the Florida Supreme Court regarding the most effective procedure for respecting federal constitutional concerns and reducing the costs of federal constitutional adjudication in a way that is minimally disruptive of Florida criminal trial practice. Though firmly grounded in this Court's precedents, they are not driven solely by those precedents but rather represent an effort to integrate the principles of federal case law into the framework of Florida practice, performed by the court uniquely qualified to do this.

[57] *See People v. Hattery*, 109 Ill. 2d 449, 488 N.E.2d 513 (1985); *State v. Carter*, 270 Kan. 426 14 P.3d 1138 (2000); *State v. Wiplinger*, 343 N.W.2d 858 (Minn.1984); *State v. Anaya*, 134 N.H. 346, 592 A.2d 1142 (1991); *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985).

[58] *Compare Dukes v. State*, 621 N.W.2d 246 (Minn. 2001) (defendant's consent required where counsel conceded guilt on some counts

tially derived from federal constitutional sources. We respectfully suggest that this is as it should be in a federal system, and that profound concerns of federalism call for this Court's giving state courts a reasonable amount of leeway in crafting local procedures for the most efficient protection of federal constitutional rights within their own judicial systems. *Cf. Reitman v. Mulkey*, 387 U.S. 369 (1967). The Court has frequently recognized that there is a vital role for the state judiciary in implementing federal constitutional guarantees.[59] It is hardly consistent with that role to crimp their freedom to blend their special understanding of local conditions with a sound appreciation of the federal guarantees that they are seeking to preserve.

II. The Florida Supreme Court Correctly Resolved the *Cronic* Aspect of Mr. Nixon's Claim of Ineffective Assistance

Cronic and *Strickland*, which were decided on the same day, share a common vision: while the immediate beneficiary of effective attorney performance is the client, the intended third-party beneficiary is the criminal justice system. *See Cronic*, 466 U.S. at 655–57 (the "underlying purpose" of the guarantee of effective assistance of counsel is to insure that the adversary process functions to illuminate truth and avert injustice).[60]

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of a multi-count indictment comprising elements of crimes charged in other counts), *with Griffin v. State*, 866 So. 2d 1 (Fla. 2003) (*contra*); *compare Harbison*, *supra* note 57 (consent required where counsel conceded guilt of a lesser included offense) *with Atwater v. State*, 788 So. 2d 223 (Fla. 2001) (*contra*).

[59] See, *e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 732 (1991), and cases cited.

[60] *See also* Comm. on Civ. Rts., Ass'n of the Bar of the City of N.Y., *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 REC. ASS'N OF THE BAR OF CITY OF N.Y. 848, 854 (1989) ("All actors in the system share an interest in the effective performance of [capital defense] counsel; such performance vindicates the rights of defendants, enables judges to have confidence in their work, and assures the states that their death sentences are justly imposed.")

Mr. Corin's unilateral decision to concede Mr. Nixon's guilt not only deprived his client of the assistance of counsel to which Nixon was entitled[61] but also infected the trial with an irremediable structural error. *Cf. Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (an erroneous reasonable doubt instruction can never be harmless error no matter how overwhelming the evidence against the defendant because the jury's verdict of guilt stands upon a structurally infirm foundation); *Johnson v. Zerbst*, 304 U.S. 458, 465–68 (1938) (the assistance of counsel is an indispensable structural component of a criminal proceeding). As the *Cronic* Court explained:

> "The right to the effective assistance of counsel is . . . the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if the defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred.[62] But if the process loses its

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[61] *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Commentary to Guideline 10.10.1 ("The client is entitled to have counsel insist that the state prove guilt beyond a reasonable doubt" [citing *Nixon II*]) (rev. ed. 2003).

[62] The Court's footnote numbered 19 at this point reads in part: "Of course the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade. *At the same time, even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt*" [citations omitted] (emphasis added).

character as a confrontation between adversaries, the constitutional guarantee is violated." (*Cronic*, 466 U.S. 656–57; footnote omitted.)

The difference between the two situations is illustrated by *Bell v. Cone*, 535 U.S. 685 (2002).[63] In that case (which this Court was reviewing under the deferential standards of 28 U.S.C. § 2254 (d) (1)), counsel at the penalty phase of a capital trial gave an opening statement in which he "called the jury's attention to the mitigating evidence" and "urged the jury that there was good reason for preserving his client's life." *Id.* at 691. He conducted a productive cross-examination of the state's witnesses (eliciting that his client had been awarded a Bronze Star in Vietnam), and successfully excluded some of the prosecution's evidence. Defense counsel then "waived final argument, preventing the lead prosecutor, who by all accounts was an extremely effective advocate, from arguing in rebuttal." *Id.* at 691–92.

On federal habeas corpus review, the Sixth Circuit held that *Cronic* had been violated because "counsel, by not asking for mercy after the prosecutor's final argument, did not subject the State's call for the death penalty to meaningful adversarial testing." *Id.* at 693.

Not surprisingly, this Court reversed, holding that *Strickland* rather than *Cronic* governed, because counsel had not "entirely" failed to "subject the prosecution's case to meaningful adversarial testing." Since the defendant's claim was "not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but rather that his counsel failed to do so at specific points," *Cronic* did not apply. *Id.* at 697.

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[63] The Florida Supreme Court had no occasion to discuss this case because it was decided after *Nixon II*, which established the legal rules that were applied as the law of the case in *Nixon III*.

The present case, in contrast, falls precisely at the core of *Cronic*. By conceding guilt in both opening and closing arguments and failing to challenge the prosecution's case in any way, counsel failed, without authorization from his client, "to oppose the prosecution throughout the [guilt] proceeding as a whole." *Id.* The result was to undermine "the basic fairness of the trial itself." *Cooper v. Oklahoma*, 517 U.S. 348, 364 (1996) (erroneous determination that the defendant was competent to stand trial would result in a fundamentally unfair proceeding in violation of *Cronic* because it would undermine the defendant's right to make decisions reserved to him, such as whether to plead guilty, as well as the ones he should make with the assistance of counsel).

Regardless of what the jury may have been told by the prosecutor or the judge about burdens of proof, once defense counsel elected to abandon the duty he owed his client to "hold the prosecution to its heavy burden of proof beyond reasonable doubt," *Cronic*, 466 U.S. at 656 n.19, the process lost one of its key structural guarantees. Nothing done by any other actor—nor any amount of prosecution evidence—could cure that loss or warrant confidence that it did not suffice to seal Nixon's conviction. For, whether or not the prosecution's case would otherwise have been convincing to the jurors, they were necessarily bound to find it ample when defense counsel himself told them that it was, when he repeated that Nixon's guilt beyond a reasonable doubt was not contestable, and when he vouched for that conclusion demonstratively by declining to contest the prosecution's case in any fashion or particular.

Where defense counsel decides without the client's consent to abandon the ship that the client should be navigating and instead to ally himself with the forces attacking the ship, a two-sided contest has become one

sided. That is a situation that cannot be salvaged by any amount of *post hoc* analysis of the resulting flawed record; the error itself precludes its cure. Thus, notwithstanding the State's solicitous concern for Nixon's rights (Pet. Br. at 28), the rule adopted by the Florida Supreme Court requiring the defendant's explicit consent before counsel can concede guilt makes perfect sense in terms of the justice system. A requirement that defense counsel hold the prosecution to its burden of proof unless the client directs the contrary implements *Cronic* by maximizing the chances that "a true adversarial criminal trial"—with its concomitant "testing envisioned by the Sixth Amendment"—will take place, to the benefit of all concerned, through and including the reviewing Justices of this Court. *See Cronic*, 466 U.S. at 656. *See also* note 60 above and accompanying text.

Moreover, even if the structural defect of a one-sided, non-adversarial trial could be retrospectively repaired, the costs of the effort would outweigh the benefits. What the State and its *amici* refer to disparagingly as a "per se rule" is, in fact, a rule of judicial economy and good sense.

The *Cronic* Court explained that its recognition of a few specific situations warranting reversal as a matter of law was designed to identify "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658. *See also Mickens v. Taylor*, 535 U.S. 162, 166 (2002) (reiterating this rationale for *Cronic*). That rationale is applicable here.

As we have shown at pages 13–22,[64] the prosecution's theory of Nixon's guilt was far from uncontestable. Only

[64] In deciding *Nixon II*, the Florida Supreme Court had before it a substantially similar analysis of the record. *See* Initial Brief of Appellant, filed June 5, 1998 at 2–28.

defense counsel's failure to contest it made it appear so. Under these circumstances, Mr. Nixon almost certainly suffered some substantial degree of harm whose extent is not ascertainable from the present record and is not worth the effort of attempting to reconstruct precisely. Without his consent, Nixon was deprived of counsel acting on his behalf to ask questions about the prosecution's case that plainly needed to be asked; and the Florida Supreme Court was on solid legal ground in declining under *Cronic* to extend the already-elongated process of postconviction review through yet further rounds of evidentiary inquiry.

CONCLUSION

The judgment of the Florida Supreme Court should be affirmed.

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Case No. 03-931

IN THE UNITED STATES SUPREME COURT

STATE OF FLORIDA, *Petitioner,*

v.

JOE ELTON NIXON, *Respondent.*

****

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Certiorari Granted March 1, 2004

REPLY BRIEF OF PETITIONER

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Case No. 03-931

IN THE UNITED STATES SUPREME COURT

STATE OF FLORIDA, *Petitioner,*

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****

ARGUMENT IN REPLY

Nixon affirmatively concedes in his brief that the Florida Supreme Court erred in two respects. First, Nixon acknowledges the Court found trial counsel ineffective *per se* without any demonstration of prejudice. And second, Nixon observes the Court erred in holding that a defendant's silent acquiescence is *per se* insufficient to authorize a defense attorney in a capital case to concede guilt in order to preserve credibility at the penalty phase. Thus, he effectively agrees with the State of Florida that the decision of the Florida Supr e Court is erroneous and must be reversed.

A. Nixon's "Introduction"

Nixon complains in his "introduction" that the State of Florida has "reconfigured" the case below "so that his alternative Strickland theory was turned into his *sole* constitutional claim." Brief for Respondent at 24-30.[1]

[1] Petitioner's citations here and in the next paragraph are to Strickland v. Washington, 466 U.S. 668 (1984); United States v. Cronic, 466 U.S. 648 (1984); and Boykin v. Alabama, 395 U.S. 238 (1969).

The State of Florida expressly noted in its brief that Nixon had raised both Cronic/Boykin *and* Strickland in the Florida courts. Petitioner's Brief on the Merits at 12-13. Nixon's Cronic/Boykin claim has not been ignored; on the contrary, that claim has been the central focus of disagreement with the Florida Supreme Court's decision, which *granted relief* on that claim and rejected the application of the Strickland standard to Nixon's claim of ineffective assistance of counsel. Petitioner's Brief on the Merits at 32.

Despite arguing strenuously that the issue of whether counsel's performance satisfies the Strickland standard is not before this Court, Nixon devotes a significant portion of his statement of facts to questioning trial counsel's evaluation of the strength of evidence against Respondent. Brief of Respondent at pp. 13-22. However, the state trial court expressly found that the evidence was "overwhelming" (App. 385), and the Florida Supreme Court *expressly agreed* that the evidence was "overwhelming." Nixon II (App. 405).[2] The Florida Supreme Court simply deemed that fact to be irrelevant to its Cronic/Boykin analysis. Nixon cannot dispute these factual determinations at this juncture.[3]

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[2] As noted in Petitioner's Brief on the Merits at p. 1(text and also fn. 1), Nixon II refers to Nixon v. State, 758 So.2d 618 (Fla. 2000), while Nixon III refers to Nixon v. State, 857 So.2d 172 (Fla. 2003).

[3] Even so, the "facts" alleged in Nixon's brief fail to contradict these determinations. Regardless of the credibility of Nixon's brother and ex-girlfriend, Nixon did not confess just to them, but to any number of people, including law enforcement (App. 386). Further, despite any questions about the ground clearance of the victim's MG, or the size of its trunk: (a) Nixon can point to no evidence that the pipeline road near which the victim's body was found was so deeply rutted that the MG could not have negotiated it; (b) witnesses saw Nixon with the victim at her MG in the mall parking lot, driving the MG later that afternoon near the murder scene, and continuing to drive the MG many times over the next couple of days (App. 386); (c) a partly burned tonneau cover was found at the scene of the crime, corroborating Nixon's confessions as well as the presence of the MG at the scene; (d) the State presented credible evidence (TR 1962-65, 2033-35) that Nixon had hidden the

B. Nixon's trial counsel made a reasonable effort to consult with him

Nixon argues that the decision of the Florida Supreme Court is fully consistent with this Court's decision in Roe v. Flores-Ortega, 528 U.S. 470 (2000), because, when the court concluded that "'silent acquiescence is not enough,'" it found that Nixon's trial counsel Michael Corin failed to make the "'reasonable effort to discover the defendant's wishes'" required by Roe. Brief of Respondent at 36, citing Roe and Nixon II.

The Florida Supreme Court, however, neither cited Roe nor addressed Petitioner's argument that its holding in Nixon II was inconsistent with Roe. Nor did the court determine that Corin failed to make a reasonable effort to discover the defendant's wishes.

Corin testified without contradiction that he had discussed his planned strategy with Nixon on a number of occasions. Indeed, the state trial court expressly found that trial counsel had "done all he could . . . to tell his client what strategies he intended to pursue," but that Nixon simply "would refuse to respond" (App. 557-60). The Florida Supreme Court did not disagree with this finding, but simply required more: the court imposed an absolute, unbending *per se* requirement that counsel expressly determine his client's wishes before acting. Nixon concedes that the Florida Supreme Court's standard "would probably demand too much of counsel" in the

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MG's spare tire in a wooded area between the mall and the truck route (i.e., on the way to the crime scene), later retrieving it when he had a flat tire. Finally, because the victim's hair and skin (along with her left leg and arm) were completely burned away, the absence of any ligature marks on the victim's neck is insignificant (TR 1940-44). Counsel, through his investigation, was well aware of the pretrial statements and depositions of all of the relevant witnesses. Notwithstanding some minor contradictions in Nixon's statements, counsel's judgment that the evidence was overwhelming and that any dispute about it would be resolved in the State's favor was not unreasonable.

"ordinary" case (Brief for Respondent at 37), but argues that this case is not "ordinary" because he was tried *in absentia*.[4]

The Florida Supreme Court, however, did not condition its holding that "silent acquiescence is not sufficient" upon Nixon's absence from trial, and has not limited its holding to cases in which the defendant has absented himself from trial.[5] See Harvey v. State, 28 Fla. L. Weekly S513 (Fla. July 3, 2003)(pending on motion for rehearing).

Furthermore, Roe holds that counsel has a constitutionally imposed duty to consult the client about whether to appeal only if there is reason to think either (1) that a rational client would want to appeal or (2) his client would want to appeal. 528 U.S. at 480. Roe does not apply a stricter standard either as to the duty to consult or as to the requirement of making a "reasonable effort" to ascertain the client's wishes when the defendant has voluntarily absented himself. In fact, defendants who have absconded may reasonably be assumed to have forfeited their right to appeal. Molinaro v. New Jersey, 396 U.S. 365 (1970); Estelle v. Donough, 420 U.S. 534 (1975). Nixon's voluntary decision to absent himself from most of his trial, conjoined with his refusal to divulge his wishes to counsel despite repeated opportunities to do so, demonstrates that Nixon was *not interested* in choosing any particular trial strategy. Trial counsel made a "reasonable effort" to ascertain his client's wishes. Nixon is entitled to no more.

Trial counsel's performance should have been reviewed for reasonableness and prejudice under Strickland rather than under the Florida Supreme Court's mechanistic formulation of "silent acquiescence is not enough," and its futile "search for words that [Nixon] was clearly disinclined to provide" (App. at 561) (Nixon III dissent, quoting trial court's order denying relief).

C. Nixon has conceded that counsel's performance should have been reviewed for prejudice

Nixon concedes (Brief for Respondent at 34) that, even if he could establish that his trial counsel failed adequately to consult with him, he would be entitled to relief under his interpretation of Roe if and only if he can demonstrate prejudice–a position entirely contradictory to the opinion of the Florida Supreme Court, which held that no showing of prejudice was necessary if the evidence failed to establish that Nixon expressly consented, in words, to counsel's strategy. Nixon II (App. 402-03).

Nixon argues (Brief of Respondent at 34-35) that the correct standard of prejudice in this case is that which this Court in Roe found applicable when counsel had unreasonably failed to file an appeal, and argues further that he has satisfied that standard. Brief of Respondent at 36. He is wrong on both counts.

Roe holds that even when an attorney has, without adequate justification, failed to consult with the defendant about whether to file an appeal, the defendant has the burden to prove that counsel's performance was prejudicial. The Court noted that, while actual prejudice generally was defined as "a reasonable probability that,

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[4] It is not surprising that a defendant who voluntarily absents himself from proceedings would not have articulated specific wishes. Nixon should not benefit from his affirmative election not to participate during portions of his trial. Rather, by electing this path, Nixon has waived any complaint that he was deprived of an opportunity to express his wishes.

[5] On direct appeal, the Florida Supreme Court upheld the trial court's determination that Nixon should not be forced to attend trial, given the likelihood of prejudice to Nixon resulting from his disorderly conduct in the presence of the jury (Nixon I, App. 366-68) ("A defendant will not be forced to attend his capital trial if his actions or the means used to ensure his presence would prejudice him in the eyes of the jury."), and Respondent does not contend that any issue about the validity of this determination is before this Court now. See Brief for Respondent at 38 (fn. 52). See also, Illinois v. Allen, 397 U.S. 337, 343 (1970) ("trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case").

but for counsel's unprofessional errors, the result of the proceeding would have been different," 528 U.S. at 482 (citing Strickland), the unjustifiable failure to consult with a defendant about whether to file an appeal was "unusual" because "counsel's alleged deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself." Id. at 483. "Accordingly," the Court held, "to show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." Id. at 484.

This formulation is inapt here. Nixon had a trial. The reliability of that trial may be disputed by Nixon, but he was not deprived of a trial altogether. Thus, he bears the burden of establishing, not only that his counsel performed deficiently, but also a reasonable probability that, but for such deficient performance, the result of the proceeding would have been different. The Florida Supreme Court erred in relieving Nixon of that burden under a Cronic analysis.

Further, even if Nixon's suggested standard of prejudice were correct, he has not satisfied that standard. He argues that his "not-guilty plea, manifest rage at learning about counsel's concession of guilt, and the manifest availability of grounds for attacking the prosecution's theory of the case" are sufficient to demonstrate "a reasonable probability" that he would have "insisted" on a different strategy if his wishes had been consulted. Brief of Respondent at 36. Nowhere has that occurred, nor has any other "plausible, different strategy" been posited that would have overcome or changed the ultimate result based on the plethora of evidence as to Nixon's guilt.

Nixon has been afforded numerous evidentiary hearings on his claim that counsel conceded guilt without his consent. Throughout, he has declined to testify or present other evidence to show either (a) that counsel failed to consult with him or (b) that he

ever objected to counsel's proposed strategy. And the express findings of the trial court (which the Florida Supreme Court left undisturbed) have consistently been that counsel did consult with Nixon, that counsel did inform him of counsel's planned strategy, and that Nixon *did not* object or insist on another strategy. The record utterly fails to support Nixon's belated claim that he would have insisted on a different trial strategy if he had been consulted and properly informed.[6]

D. The Florida Supreme Court did not base its decision upon state law

Nixon concedes that, because the right to effective assistance of counsel at issue in this case is "federal, this Court has undoubted authority to define its contours." Brief for Respondent at 40. But, he argues, a state court may "see the need to insist on strict rules for the way in which criminal attorneys perform the duty of consultation recognized in Roe" and may impose limitations on the conduct of defense counsel that "go beyond" what this Court has imposed, as a matter of state law. Brief for Respondent at 40-41.

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[6] Nixon's plea of not guilty is properly seen as no more than an insistence on a trial, which Respondent received. Moreover, as Petitioner noted in its brief (p. 5, fn. 5), it appears that Nixon himself did not personally enter his plea; rather, his counsel filed a not-guilty plea as a "matter of course" without expressed direction from Nixon. The plea, then, cannot be deemed any sort of personal objection to or disagreement with his counsel's strategy. Further, the newspaper account referenced by Nixon has never been submitted as evidence in any evidentiary hearing. As noted in Petitioner's brief (p. 6, fn. 8), Nixon "did not state at the time of the trial, and has not testified since, that he absented himself as the result of, or as a means of protesting, his trial counsel's strategy." In fact, the trial court attempted to ascertain why Nixon was absenting himself, and Nixon declined to answer (TR 335-38). Finally, the alleged availability of grounds to attack the prosecution's case is not only not at issue here, but the record refutes the contention that counsel had any reasonable basis for attacking the State's overwhelming evidence of guilt. See fn. 3 of this reply.

The initial failure of Nixon's argument is that the decision of the Florida Supreme Court was not based upon state law, but was expressly based upon the court's misinterpretation of decisions applying federal constitutional law.

Second, Roe expressly rejected the application of "strict rules" to the performance of counsel in criminal cases. The Florida Supreme Court, like the lower court in Roe, has attempted "to impose mechanical rules on counsel" and, like the lower court in Roe, should be reversed for having done so. Specific guidelines and "detailed rules" for counsel's conduct have "no place in a Strickland inquiry." 528 U.S. at 480-81. For reasons set out in Petitioner's brief (pp. 19-23), trial counsel's strategy in this case was not unreasonable under the circumstances; in fact, a contrary strategy could well have been strategically unwise, and detrimental to Nixon's chances of receiving a life sentence, as the Florida Supreme Court itself recognized. Nixon II (App. 405-06). Trial counsel's strategic judgment in this case did not fall outside the "wide range of competence" we demand of attorneys, and a state appellate court may not, consistently with Strickland and its progeny, prohibit an attorney from adopting reasonable strategies by adopting a mechanical one-size-fits-all *per se* rule.

E. Nixon's trial counsel did not ally himself with the forces "attacking his client's ship."

Nixon argues that, by conceding guilt, his counsel "abandon[ed] the ship that the client should be navigating and instead [allied] himself with the forces attacking the ship." Brief for Respondent at 45. It is clear from the record, however, that counsel did not forsake his client or ally himself with the prosecution. Counsel's strategy, undertaken after considerable investigation and preparation and in the face of overwhelming evidence, was "to select the issue that really had to be tried in this case [i.e., sentence] and try that issue" (App. 356) by what counsel deemed to be the most effective means available. Because counsel did not fail to function as an adversary to the prosecution, his actions must be

reviewed under the Strickland standard for deficient performance and prejudice, rather than having been found *per se* deficient and prejudicial by the application of an inflexible rule.

CONCLUSION

For all the reasons set out in Petitioner's Brief on the Merits and in this Reply, the Florida Supreme Court should be reversed.

Respectfully submitted,

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No. 03-931

In the Supreme Court of the United States

STATE OF FLORIDA, PETITIONER

v.

JOE ELTON NIXON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

CAPITAL CASE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether counsel's strategy of conceding guilt, in the face of overwhelming evidence, during respondent's capital trial in order to maintain credibility when arguing for leniency in the sentencing phase constituted ineffective assistance per se, where counsel discussed the strategy with respondent and respondent neither indicated any objection nor gave explicit consent.

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In the Supreme Court of the United States

No. 03-931

STATE OF FLORIDA, PETITIONER

v.

JOE ELTON NIXON

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether trial counsel's strategy of conceding guilt, in the face of overwhelming evidence, during respondent's capital trial in order to maintain credibility when arguing for leniency in the sentencing phase constituted ineffective assistance per se, where counsel discussed the strategy with respondent and respondent neither indicated any objection nor gave explicit consent. The United States has a substantial interest in the Court's resolution of that question because claims of ineffective assistance of counsel are frequently asserted on collateral review of federal criminal judgments.

STATEMENT

1. On August 14, 1984, police officers in Tallahassee, Florida, arrested respondent for the murder of Jeanne Bickner. Bickner's body had been discovered in a wooded area the previous day, tied to a tree and badly charred from

burns. Her car, an orange M.G., was found in a drainage ditch and had been burned throughout. *Nixon* v. *State*, 572 So. 2d 1336, 1337-1338 (Fla.), cert. denied, 502 U.S. 854 (1991).

After his arrest, respondent gave a detailed, taped confession. He explained that he approached Bickner at a shopping mall and told her he was having trouble with his uncle's car. Bickner agreed to take respondent to his uncle's home. When they were on the road, respondent struck Bickner in the face. After stopping the car, respondent put Bickner into the trunk and drove to a wooded area, where he removed her from the car and tied her to a tree with jumper cables. Bickner offered to give respondent money and begged him not to kill her. After the two discussed their lives, respondent set fire to Bickner's personal belongings and burned the car's convertible top. He later placed a bag over Bickner's head, set her on fire, and drove away in her car. Bickner burned to death. *Nixon*, 572 So. 2d at 1338.

The evidence at trial included respondent's taped confession, as well as testimony by both respondent's girlfriend and his brother that respondent had confessed to the crime. They explained that respondent had admitted killing a woman by burning her after tying her with jumper cables, had shown them two of the victim's rings, had told them later that he pawned the rings, and had said that he was going to burn the victim's orange M.G. The State also demonstrated that respondent's palm print was on Bickner's car, and introduced a pawn shop receipt signed by respondent for two of Bickner's rings. In addition, witnesses testified that they saw a man later identified as respondent on the afternoon of the murder driving an orange M.G. near the site where Bickner's body was found. *Nixon*, 572 So. 2d at 1338.

2. Respondent was charged with first-degree murder, kidnapping, robbery, and arson, and the State sought a capital sentence. Respondent's trial counsel, Michael Corin, broached with the State the possibility of a guilty plea in exchange for a life sentence. The State refused because of the overwhelming evidence of guilt and the severity of the crime. J.A. 336-339.[1] Corin perceived no benefit in respondent's pleading guilty without a life sentence in exchange. Corin believed, however, that because of the strength of the evidence against respondent, efforts to contest his guilt would impair the credibility of arguments for a non-capital sentence in the sentencing phase of respondent's trial. Corin therefore pursued a strategy of acknowledging respondent's guilt in order to maintain credibility with the jury when arguing at sentencing that respondent's life should be spared. J.A. 254, 261, 457-459, 471-472, 505.

a. In his opening statement in the guilt phase, Corin told the jury that "there will be no question that Jeannie Bickner died a horrible, horrible death" and "that horrible tragedy will be proved to your satisfaction beyond any reasonable doubt." Pet. App. 4a. He also stated that "there won't be any question, none, whatsoever, that my client, Joe Elton Nixon, caused Jeannie Bickner's death. Likewise that fact will be proved to your satisfaction beyond any reasonable doubt." *Ibid.* Corin explained that "[t]his case is about the death of Joe Elton Nixon and whether it should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement." *Ibid.*

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[1] The prosecutor testified in postconviction proceedings that Corin indicated in the plea discussions that respondent had told Corin that respondent would plead guilty in exchange for a life sentence, J.A. 339, but Corin could not specifically recall whether he had discussed the issue with respondent, J.A. 498.

Corin repeated the same theme in his closing argument, stating to the jury, "I wish I could stand before you and argue that what happened wasn't caused by Mr. Nixon, but we all know better." Pet. App. 5a. Corin said that the trial judge would "give you some verdict forms that have been prepared," and that "I think that what you will decide is that the State * * * has proved its case." *Ibid.* He explained that, "there will by [your] decision be caused a second part of this trial," and that, "I will hope to be able to argue to you and give you reasons not that [respondent] be spared one final and terminal confinement forever, but that he not be sentenced to die." J.A. 73-74. The jury found respondent guilty on all counts.[2]

b. In the sentencing phase, Corin attempted to show that respondent had long suffered from severe mental and emotional problems, including at the time of the murder. Corin introduced a number of exhibits and presented the testimony of eight witnesses, including respondent's family and friends as well as two mental health experts.

One of the experts, a psychiatrist, testified that "reports from way back showed that there is something about [respondent] that nobody could quite understand, and they felt that there must be something neurologically wrong or some-

[2] Respondent refused to attend most of the trial proceedings, including on the days of Corin's opening and closing arguments. Pet. App. 41a n.3; *Nixon*, 572 So. 2d at 1341-1342. Respondent first declined to be present early in the trial during consideration of pretrial motions; and on a later day, at the time of jury selection, respondent disrobed to his underwear and again refused to enter the courtroom. The trial judge conducted a hearing in respondent's cell, in which respondent threatened to disrupt the proceedings if forced to go to the courtroom and repeatedly reiterated his refusal to attend the proceedings. The judge found that respondent had waived his right to be present in the courtroom, and that forcing him to attend the proceedings would prejudice him before the jury. The trial judge at various points in the trial revisited the issue, but respondent declined to be present for most of the trial. *Ibid.*

thing wrong." J.A. 143. He believed that respondent, while not suffering from "gross psychosis," has "brief psychotic episodes," J.A. 144, and that respondent was suffering from impaired capacity at the time of the murder, J.A. 146-147. The other expert, a psychologist, testified that respondent had "borderline" intelligence and suffered from brain damage, J.A. 160-161, and that his condition was "[n]ot normal in several senses," J.A. 163. He stated that respondent "does better in structured situations," J.A. 171, and believed that death would not be an appropriate sentence because respondent was not "an intact human being," J.A. 174.[3]

In closing arguments, after reviewing the evidence of respondent's mental and emotional problems, J.A. 196-209, Corin argued that respondent should be spared a sentence of death because he has "never been" and "never will be" an "intact human being," J.A. 209. He ended by stating, "it's rare when we have the opportunity to give or take life. And you have that opportunity to give life. And I'm going to ask you to do that." *Ibid.*

The jury recommended that respondent be sentenced to death, J.A. 210, and the trial court imposed a capital sentence. At the close of the proceedings, the trial judge observed that "[o]ne facet of the case that doubtless will come

[3] When asked to give his opinion concerning respondent's competency, the psychiatrist testified that "the law says he's competent and capable of standing trial" but "[h]e's not the most competent individual in the world as far as making decisions is concerned." J.A. 147. Corin had also represented respondent in an unrelated trial five months beforehand and had raised the issue of respondent's competency at that time. Pet. App. 55a-56a. Respondent then was deemed competent to stand trial. In this case, respondent sought relief in the state post-conviction proceedings on the ground that he had been incompetent at the time of trial. *Id.* at 39a n.1. Because the Florida Supreme Court granted relief on respondent's claim of ineffective assistance, the court has not ruled on his competency claim. See *id.* at 55a-57a.

under examination is the tactics, strategy, [and] analysis employed by defense counsel." Pet. App. 59a. The judge expressed his "view that the tactic employed by trial counsel in this case was an excellent analysis of [the] reality of his case." *Id.* at 60a. According to the judge, the evidence of guilt "would have persuaded any jury * * * beyond all doubt," and "[f]or trial counsel to have inferred that [respondent] was not guilty of these offenses would have deprived him of any credibility during the penalty phase." *Ibid.*

3. On appeal, respondent, represented by different counsel, argued that his trial counsel had rendered ineffective assistance by conceding his guilt without obtaining his approval. The Florida Supreme Court remanded for an evidentiary hearing on that claim. *Nixon*, 572 So. 2d at 1338-1339.

The scope of questioning of Corin on remand was limited because respondent refused to waive his attorney-client privilege. *Nixon*, 572 So. 2d at 1339. Corin did testify, however, that he had advised respondent several times that his objective was to save respondent's life and that, if the State were to reject the plea offer, his strategy was to forgo contesting respondent's guilt. J.A. 235-237, 253-255, 260-261. Corin also explained that respondent, when advised of the strategy, raised no objection. J.A. 238, 255-256. The trial court found that "Corin reviewed with [respondent] the defense approach" including "the probability that he would concede" guilt, that respondent "did not protest the strategy," and that respondent had failed to demonstrate that he had not "consent[ed] thereto" or "acquiesce[d] therein." *Nixon*, 572 So. 2d at 1340 n.3. The Florida Supreme Court ultimately declined to resolve the claim because of the limited state of the record. *Id.* at 1340.

4. a. Respondent renewed his ineffective assistance claim in state post-conviction proceedings. The trial court denied relief, ruling that respondent could not demonstrate prejudice under *Strickland* v. *Washington*, 466 U.S. 668 (1984). Pet. App. 21a.

b. A divided Florida Supreme Court remanded for an evidentiary hearing. Pet. App. 37a-70a. While acknowledging that "counsel's strategy may have been in [respondent's] best interest," *id.* at 49a, the court held that it would "find counsel to be ineffective *per se*" if respondent could "establish that he did not consent to counsel's strategy," *id.* at 45a-46a. The court believed that counsel's statements in the guilt phase "were the functional equivalent of a guilty plea," and that respondent thus should prevail if "there was not an affirmative, explicit acceptance by [respondent] of counsel's strategy." *Id.* at 49a. The court determined that respondent need not demonstrate prejudice under *Strickland*, *supra*, because, in the court's view, counsel's strategy amounted to a complete failure of adversarial testing and thus triggered a per se presumption of prejudice under *United States* v. *Cronic*, 466 U.S. 648 (1984). Pet. App. 44a-46a. If respondent had not explicitly consented to counsel's strategy, the court held, counsel was required instead to follow a strategy of "hold[ing] the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element" by "proof beyond a reasonable doubt." *Id.* at 49a-50a.

c. Respondent did not testify in the hearing on remand. He was required to waive the attorney-client privilege, however, Pet. App. 49a, and Corin testified that, on more than one occasion, he had advised respondent of his planned strategy of not contesting respondent's guilt and focusing on saving respondent's life in the sentencing phase. J.A. 458, 472-473, 480. Corin stated that he would not have pursued that strategy if respondent had raised an objection, but that respondent gave no such indication. J.A. 472, 478. On the

occasions that Corin discussed the trial strategy with respondent, respondent "did nothing." J.A. 486-488, 501.[4]

The trial court ruled that, while respondent "did not provide counsel with an affirmative, explicit consent *in words*," he "did consent to the trial strategy." Pet. App. 34a. The court explained that the "consent occurred as a part of his natural pattern of communication with Mr. Corin, wherein Mr. Corin would discuss these matters with [respondent] and [respondent] would refuse to respond." *Ibid.*

d. A divided Florida Supreme Court reversed and remanded for a new trial. Pet. App. 2a-36a. The court concluded that the evidence demonstrated, "at most," "silent acquiescence" rather than the "affirmative and explicit consent" required by its previous decision. *Id.* at 8a-9a. The court reiterated that, without explicit consent, counsel was required to pursue a strategy emphasizing the State's burden of proof. *Id.* at 9a.

SUMMARY OF ARGUMENT

To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was unreasonable and that the deficient performance rendered the result of the trial unreliable. *Strickland* v. *Washington*, 466 U.S. 668 (1984). The Florida Supreme Court erred both in holding that counsel's performance was unreasonable as a matter of law and in holding that the allegedly deficient performance was prejudicial per se.

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[4] Corin stated that he met with respondent after opening statements, and respondent, who had read about the opening statements in the newspaper, indicated displeasure. J.A. 459-460. Corin also testified that he had discussed the trial strategy with respondent before the trial began and respondent had indicated no objection at that time, J.A. 482-483, and that, by the time of opening statements, the decision had been made to proceed with the strategy of conceding respondent's guilt, J.A. 487-488.

A. A well-recognized goal of defense representation in capital cases is for counsel to avoid compromising the case for leniency in the sentencing phase by presenting a futile guilt-phase challenge in the face of overwhelming evidence. In the circumstances of a particular case, counsel therefore can reasonably conclude that the best strategy for avoiding a capital sentence is to acknowledge the defendant's guilt and thereby maintain credibility with the jury in the sentencing phase.

B. The Florida Supreme Court adopted a blanket rule that, before pursuing such a strategy, counsel must obtain the defendant's explicit and affirmative consent. A strict rule of explicit consent is inconsistent with the fact-specific inquiry mandated by *Strickland*. In this case, respondent refused to attend much of the trial, offered little assistance to counsel in conducting the defense, and gave no reaction when counsel discussed with him the strategy of acknowledging guilt. In those circumstances, it was reasonable for counsel to proceed in accordance with his considered judgment that the best way to avert a capital sentence involved conceding respondent's guilt. That sort of tactical judgment is consistent with counsel's traditional role in conducting the trial. While counsel is obligated to consult with the defendant on important decisions, such as the strategy employed here, counsel met that obligation in this case.

The Florida Supreme Court erred in concluding that a strategy of acknowledging guilt is the functional equivalent of entering a plea of guilty. Unlike a guilty plea, which is sufficient in itself to convict the defendant, a strategy of acknowledging guilt does not waive the defendant's rights to a jury trial or to a determination of guilt by proof beyond a reasonable doubt. Notwithstanding an acknowledgment of guilt, counsel can seek to exclude evidence introduced by the prosecution, and can challenge a conviction on appeal or on collateral review on the ground that the trial was infected by

error. Moreover, in a capital case, if the defendant goes to trial rather than pleads guilty, the prosecution will be required to present much of its evidence at the guilt phase, thereby allowing the sentencing phase to focus centrally on the reasons for sparing the defendant. Thus, a strategy of conceding guilt should not be subjected to a formal and rigid requirement of express client consent on the theory that it is akin to a guilty plea, but instead should be assessed under *Strickland*'s general test of measuring the reasonableness of attorney performance in light of all the circumstances.

C. Even if it were thought that counsel performs deficiently as a matter of law by pursuing a strategy of acknowledging guilt without the defendant's explicit consent, that asserted error is not prejudicial per se. Counsel's failure to obtain explicit consent could cause prejudice only if the defendant would have withheld consent. Given the overwhelming evidence in this case and the pattern of counsel's interactions with respondent, there is no indication that respondent would have withheld his consent to a strategy of forgoing a guilt phase challenge in the interest of maximizing his chances to avoid a capital sentence.

Even if respondent would have withheld consent, the Florida Supreme Court erred in concluding that counsel's strategy represented a complete failure of adversarial testing and thus was prejudicial per se under *United States* v. *Cronic*, 466 U.S. 648 (1984). Far from a complete failure to test the prosecution's case, counsel made a considered judgment that acknowledging guilt presented the best way to overcome the prosecution's case for a capital sentence. *Cronic*'s per se presumption applies to situations in which prejudice is so likely that a case-by-case inquiry into prejudice is unwarranted. There is no basis for applying a blanket presumption of prejudice when counsel has made a reasoned determination that the evidence against the defendant is so

overwhelming that any effort to contest it would sacrifice his credibility and undermine efforts to save his client's life.

ARGUMENT

ACKNOWLEDGING A CAPITAL DEFENDANT'S GUILT IN ORDER TO MAINTAIN CREDIBILITY AT SENTENCING IS NOT PER SE INEFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL DISCUSSES THE STRATEGY WITH THE DEFENDANT AND THE DEFENDANT RAISES NO OBJECTION

In view of the strength of the evidence against respondent, trial counsel made a reasonable judgment not to contest respondent's guilt in an effort to bolster the credibility of the case for leniency in the sentencing phase. Counsel did not render ineffective assistance per se by pursuing that strategy after he discussed it with respondent and respondent indicated no objection, notwithstanding that respondent had not given an affirmative and explicit consent.

A. A Capital Defendant's Counsel Can Reasonably Pursue A Strategy Of Conceding Guilt In Order To Maintain Credibility At Sentencing

1. "The Sixth Amendment guarantees criminal defendants the effective assistance of counsel. That right is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense." *Yarborough* v. *Gentry*, 124 S. Ct. 1, 4 (2003) (per curiam); *Strickland* v. *Washington*, 466 U.S. 668 (1984). Counsel, however, enjoys "wide latitude * * * in making tactical decisions," and "strategic choices made" among "plausible options are virtually unchallengeable." *Id.* at 689-690. Contesting guilt may not be a "plausible option[]," *id.* at 690, when the evidence is overwhelming, and "the Sixth Amendment does not require that counsel do what is impossible * * * . If there is no bona fide defense to the

charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." *United States* v. *Cronic*, 466 U.S. 648, 656-657 n.19 (1984).

Accordingly, counsel confronted with overwhelming evidence of guilt on a charge can reasonably adopt a strategy of acknowledging the defendant's guilt in an effort to avoid undermining the credibility of arguments on other charges or on sentencing issues. See *Gentry*, 124 S. Ct. at 6 ("By candidly acknowledging his client's shortcomings, counsel might * * * buil[d] credibility with the jury and persuade[] it to focus on the relevant issues in the case."). As a number of courts have held, when counsel concedes a defendant's guilt as a "tactical decision, designed to lead the jury towards leniency on the other charges and to provide a basis for a later argument * * * for a lighter sentence," such a "tactical retreat[]" is "deemed to be effective assistance." *United States* v. *Tabares*, 951 F.2d 405, 409 (1st Cir. 1991) (Breyer, J.) (citation and internal quotation marks omitted); accord *United States* v. *Holman*, 314 F.3d 837, 840 (7th Cir. 2002), cert. denied, 538 U.S. 1058 (2003); *Haynes* v. *Cain*, 298 F.3d 375, 380-382 (5th Cir.), cert. denied, 537 U.S. 1072 (2002); *Parker* v. *Head*, 244 F.3d 831, 840-841 (11th Cir.), cert. denied, 534 U.S. 1046 (2001); *United States* v. *Gomes*, 177 F.3d 76, 83-84 (1st Cir.), cert. denied, 528 U.S. 911 and 941 (1999); *Lingar* v. *Bowersox*, 176 F.3d 453, 459 (8th Cir. 1999), cert. denied, 529 U.S. 1039 (2000); *Bell* v. *Evatt*, 72 F.3d 421 (4th Cir. 1995), cert. denied, 518 U.S. 1009 (1996); *Underwood* v. *Clark*, 939 F.2d 473 (7th Cir. 1991).

2. The same considerations apply in a capital trial when counsel acknowledges guilt in order to enhance the case for sparing the defendant's life in the sentencing phase. See *Parker*, 244 F.3d at 840; *Lingar*, 176 F.3d at 459; see also *Anderson* v. *Calderon*, 232 F.3d 1053, 1087-1090 (9th Cir. 2000), cert. denied, 534 U.S. 1036 (2001); *Bell*, 72 F.3d at 427-430. From defense counsel's perspective, the gravity of the

potential sentence in a capital case heightens the need to maintain strategic focus on the sentencing implications of counsel's actions: "Death is different because avoiding execution is, in many capital cases, the best and only realistic result possible." American Bar Ass'n, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* 10.9.1 cmt. (Feb. 2003) (*ABA Death Penalty Guidelines*) (internal quotation marks omitted) (*reprinted in* 31 Hofstra L. Rev. 913, 1040 (2003)).

The evidence of guilt against a capital defendant often is overwhelming. See, *e.g.*, Victor L. Streib, *Would You Lie to Save Your Client's Life? Ethics and Effectiveness in Defending Against Death*, 42 Brandeis L.J. 405, 414 (2004); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. Ill. L. Rev. 323, 368 (1993); Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 329, 331 (1983). That is in part because prosecutors are more likely to seek a sentence of death if the case for guilt is very strong. See White, *supra*, at 368 n.309. Because the guilt phase evidence may be overwhelming, and because prosecutors, once having decided to bring a capital charge, may be disinclined to exchange a life sentence for a guilty plea, see *ABA Death Penalty Guidelines* 10.9.1 cmt. (31 Hofstra L. Rev. at 1041), "attorneys familiar with capital cases view the penalty trial as the probable focal point of the capital case." White, *supra*, at 325; see Goodpaster, *supra*, at 331 ("[B]ecause of the strength of the evidence of guilt, the penalty phase trial is the only real trial the defendant will receive.").

In light of that focus, a basic rule of representation in capital cases is to avoid taking a position in the guilt phase that could compromise arguments for leniency in the sentencing phase. "Ideally, the theory of the trial must complement, support, and lay the groundwork for the theory of

mitigation. Consistency is crucial because * * * counsel risks losing credibility by making an unconvincing argument in the first phase that the defendant did not commit the crime, then attempting to show in the penalty phase why the client committed the crime." *ABA Death Penalty Guidelines* 10.11 cmt. (31 Hofstra L. Rev. at 1059) (internal quotation marks and footnote omitted); see *id.* at 10.10.1 cmt. (31 Hofstra L. Rev. at 1047-1048); Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L. Rev. 1557, 1558-1559 (1998); Streib, *supra*, at 409; White, *supra*, at 356-358; Goodpaster, *supra*, at 329. In the words of one attorney, "[i]t is not good to put on a 'he didn't do it' defense and a 'he is sorry he did it' mitigation. This just does not work. The jury will give the death penalty to the client and, in essence, the attorney." Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 Mercer L. Rev. 695, 708 (1991); see *Lingar*, 176 F.3d at 459.

In some situations—such as if the evidence of guilt is largely circumstantial or if the defendant acted with others and his individual level of participation in the murder is unclear—counsel might contest the defendant's guilt and pursue a "residual doubt" strategy at sentencing. See Sundby, *supra*, at 1597-1598; Lyon, *supra*, at 710-711. See also *Lockhart* v. *McCree*, 476 U.S. 162, 181 (1986). But when, as in this case, there is overwhelming evidence that a particular person is responsible for a capital murder, contesting the defendant's guilt "could so prejudice the sentencer that no persuasive case for a life sentence can be made at the sentencing phase." Goodpaster, *supra*, at 329; White, *supra*, at 357. Accordingly, one study showed that capital juries were especially likely to view mitigation evidence favorably "in cases in which the defendant acknowledged from the outset of the trial that he had done the killing." Sundby, *supra*, at 1591-1592; see *id.* at 1595 ("Depending on the

nature of the evidence, the most effective defense at the guilt-innocence phase might be as simple as * * * expressly establish[ing] a theme of accepting responsibility.").

The Florida Supreme Court held in this case, because of the absence of explicit client consent, that rather than acknowledging respondent's responsibility for Bickner's murder, trial counsel was required to pursue a strategy of "clearly articulating to the jury * * * that the State must establish each element of the crime charged" by "proof beyond a reasonable doubt." Pet. App. 49a-50a; see *id.* at 9a. But a "run-of-the-mill strategy of challenging the prosecution's case for failing to prove guilt beyond a reasonable doubt" can have dire implications for the sentencing phase. Sundby, *supra*, at 1597; see *ABA Death Penalty Guidelines* 10.10.1 cmt. (31 Hofstra L. Rev. at 1047); White, *supra*, at 357; Goodpaster, *supra*, at 329. In short, a "capital case clearly is one situation in which blindly relying on the presumption of innocence and putting the prosecution's evidence 'to the test' may prove to be fatal." Sundby, *supra*, at 1598.[5]

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[5] See *Lingar*, 176 F.3d at 459 (By conceding guilt of second-degree murder, "counsel could retain some credibility and gain an advantage by winning the jury's trust. Even if the jury convicted Lingar of first-degree murder, the jury might then be more sympathetic to defense witnesses testifying in the penalty phase that Lingar deserved mercy. Given the overwhelming evidence, Lingar could not credibly deny involvement in Allen's killing, and denying all involvement could inflame the jury and incite it to render a death sentence.") (citations omitted).

B. An Otherwise Sound Strategy Of Acknowledging Guilt To Enhance Arguments For A Non-Capital Sentence Is Not Deficient Performance As A Matter Of Law When Pursued Without Explicit Client Consent

"In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. The inquiry is "highly deferential," *id.* at 689, particularly with respect to informed tactical judgments, which are "virtually unchallengeable," *id.* at 690. Given the ample evidence of respondent's guilt, trial counsel reasonably elected not to contest respondent's guilt in an effort to maintain credibility in the sentencing proceedings that he presumed would follow.

The Florida Supreme Court did not question the soundness of counsel's strategy, recognizing that it "may have been in [respondent's] best interest." Pet. App. 49a. Nor did the court suggest that counsel chose that strategy on the basis of an inadequate investigation. See *Wiggins* v. *Smith*, 123 S. Ct. 2527 (2003); *Strickland*, 466 U.S. at 690-691. The court instead held that counsel performed deficiently as a matter of law by pursuing that strategy without respondent's explicit and affirmative consent. Pet. App. 8a-9a, 46a-49a. That was error.

1. *Counsel does not perform deficiently as a matter of law by pursuing a strategy of conceding guilt after discussing the strategy with the defendant and hearing no objection*

While a criminal defendant has authority over certain "fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal," *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983), counsel bears principal responsibility for the conduct of the defense. See *id.* at 753 n.6; *New York* v. *Hill*, 528 U.S. 110, 114-115 (1999); *ABA Standards for Criminal Justice Prosecution Function and Defense Function* 4-5.2 (3d ed. 1993) (*ABA Standards*). Of particular salience, counsel has responsibility for determining "what arguments to pursue," *Hill*, 528 U.S. at 115 (citing *Jones*, 463 U.S. at 751), and "what defenses to develop," *Wainwright* v. *Sykes*, 433 U.S. 72, 93 & n.1 (1977) (Burger, C.J., concurring). In this case, counsel's strategy of acknowledging respondent's guilt in order to strengthen the case for leniency at sentencing was a judgment about what "arguments" and "defenses" to pursue. Cf. *Gentry*, 124 S. Ct. at 6 ("While confessing a client's shortcomings might remind the jury of facts they otherwise would have forgotten, it might also convince them to put aside facts they would have remembered in any event. This is precisely the sort of calculated risk that lies at the heart of an advocate's discretion.").

Although counsel bears principal responsibility for tactical judgments about the conduct of the defense, counsel also must "consult with the defendant on important decisions." *Strickland*, 466 U.S. at 688; see *Government of the Virgin Islands* v. *Weatherwax*, 77 F.3d 1425, 1436 (3d Cir.), cert. denied, 519 U.S. 1020 (1996); *ABA Model Rules of Professional Conduct* 1.4(b) (2004) (*ABA Model Rules*); *ABA Standards* 4-3.8(b), 4-5.2(b). The obligation of consultation serves several purposes. It gives the defendant an opportunity to provide information uniquely in his possession in support of his defense, it ensures counsel's awareness of the defendant's views, and it also generally promotes an effective attorney-client relationship. *Weatherwax*, 77 F.3d at 1436. Moreover, if the defendant disagrees with counsel's judgments and considers the matter to be sufficiently important, he might seek leave to obtain different representation or perhaps to represent himself. *Id.* at 1536-1537; see *Faretta* v. *California*, 422 U.S. 806 (1975).

Counsel's strategy in this case to acknowledge respondent's guilt in the guilt phase was an "important decision[]"

about which he was required to consult with respondent. *Strickland*, 466 U.S. at 688; see *Holman*, 314 F.3d at 840. Counsel satisfied that obligation by discussing alternate defenses and strategies with respondent, J.A. 260-261, 476-477, 501-502, and by advising respondent on several occasions that his objective was to save respondent's life through a strategy of conceding respondent's guilt to maintain credibility at sentencing, J.A. 254-255, 261, 458, 472-473, 480. Respondent "was given the opportunity to express his displeasure," J.A. 238, but "did nothing" in response, J.A. 486-488, 501, neither giving any indication that he objected to the strategy nor explicitly embracing it. Counsel could reasonably infer in those circumstances that respondent tacitly acquiesced in the strategy, and it was not unreasonable for counsel to proceed in accordance with his considered judgment concerning how best to serve respondent's interests.[6]

2. *This Court should adhere to the contextual inquiry mandated by* Strickland *rather than adopt a blanket requirement of explicit consent*

The Florida Supreme Court adopted a per se rule barring trial counsel's strategy of acknowledging guilt in the absence of the defendant's explicit consent. That approach draws a hard-and-fast distinction between "silent acquiescence" and "affirmative and explicit consent," Pet. App. 8a-9a, regardless of the nature of counsel's interactions with the defendant or of the merits of counsel's strategy in a particular case.

[6] Because respondent did not give any indication that he objected to counsel's announced strategic plan to concede guilt in order to preserve credibility at sentencing, and because counsel would not have pursued that strategy if respondent had objected, J.A. 472, 478, this case does not raise the question whether counsel performs unreasonably as a matter of law by pursuing a strategy of acknowledging the defendant's guilt in the face of a specific objection by the defendant. Several courts have noted that pursuing a concession-of-guilt strategy in the face of client objection may raise different issues. See *Haynes*, 298 F.3d at 382 (noting the issue but declining to resolve it); *Gomes*, 177 F.3d at 84 (same).

This Court has rejected such mechanical, "*per se* rule[s] as inconsistent with *Strickland*'s * * * circumstance-specific reasonableness inquiry." *Roe* v. *Flores-Ortega*, 528 U.S. 470, 478 (2000); see *id.* at 479-481; *Wiggins*, 123 S. Ct. at 2535. Rigid rules for judging counsel's conduct fail to "take account of the variety of circumstances faced by defense counsel" and can detract "from the overriding mission of vigorous advocacy of the defendant's cause." *Strickland*, 466 U.S. at 688-689. Moreover, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.* at 691. In this case, while counsel desired respondent's "input in how to proceed in the trial," J.A. 319, respondent refused to attend most of the trial proceedings, gave minimal assistance and "little, if any" direction to counsel, J.A. 478-479, and "did nothing affirmative or negative" when counsel discussed the trial strategy with him, J.A. 483.

There is no warrant for applying an inflexible requirement of explicit consent in those circumstances, particularly at the cost of preventing counsel from pursuing what he reasonably views to be the only viable strategy for averting a capital sentence. The Florida Supreme Court's approach runs contrary to the general recognition that a "lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation." *ABA Model Rules* 1.2(a); see *Lingar*, 176 F.3d at 458 ("not necessary that [defendant] expressly consent to the concession" of guilt by counsel as tactical measure). In capital cases, moreover, the client often "may be unable or unwilling to provide information necessary for the attorney to represent the client effectively," White, *supra*, at 338, and "[m]any capital

defendants are, in addition, severely impaired in ways that make effective communication difficult," *ABA Death Penalty Guidelines* 10.5 cmt. (31 Hofstra L. Rev. at 1007). Those factors weigh against unduly formalizing counsel-client interactions by interjecting a requirement of explicit and affirmative consent.[7]

The Florida Supreme Court's strict rule of explicit consent also does not give clear guidance to counsel. Statements by counsel alleged to amount to concessions of guilt can come in a variety of forms, and it is unclear precisely what set of words—and what degree of concession—might trigger the requirement of explicit consent. See *McNeal* v. *Wainwright*, 722 F.2d 674, 675 (11th Cir. 1984) (evidence "perhaps" and "at most" establishes guilt of manslaughter). The implications of counsel's statements might vary not only depending on the specific choice of words, but also depending on when they occur in the course of the proceedings. See *Atwater* v. *State*, 788 So. 2d 223, 231 (Fla. 2001) (distinguishing opinion below on ground that counsel in this case made statements in opening argument "before any evidence was presented").

Rather than establishing such "detailed guidelines for representation" depending on what words are used and

[7] The commentary to the *ABA Death Penalty Guidelines* cites the Florida Supreme Court's second opinion in this case (Pet. App. 37a-70a) in observing that "[s]ome decisions require the client's knowledge and agreement." *ABA Death Penalty Guidelines* 10.5 cmt. (31 Hofstra L. Rev. at 1008 n.179); see *id.* at 1010.10.1 cmt. (31 Hofstra L. Rev. at 1047 n.255). But the commentary also explains that "the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that it must be assumed that the client is emotionally and intellectually impaired." *Id.* at 10.5 cmt. (31 Hofstra L. Rev. at 1007) (internal quotation marks omitted). Particularly if that is so, it would be impractical and counterproductive to formalize the interactions between counsel and client in the manner prescribed by the Florida Supreme Court.

when they are stated, *Strickland*, 466 U.S. at 689, the proper course is to "judge the reasonableness of counsel's challenged conduct on the facts of the particular case," *id.* at 690. Under that approach, trial counsel in this case did not perform unreasonably by pursuing a strategy of acknowledging respondent's guilt after he advised respondent of that strategy and respondent indicated no objection or concerns.

3. *A concession of guilt by counsel is not the equivalent of a plea of guilty*

The Florida Supreme Court grounded its strict requirement of explicit consent in its conclusion that counsel's statements acknowledging guilt were the equivalent of a guilty plea. Pet. App. 9a, 47a-49a. That analogy is flawed. As this Court has explained, a "plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969); see *id.* at 242-243 n.4. A guilty plea thus effects a waiver of several constitutional rights, including the rights to a jury trial and to a determination of guilt by proof beyond a reasonable doubt. See *United States* v. *Ruiz*, 536 U.S. 622, 628-629 (2002); *Boykin*, 395 U.S. at 242. For those reasons, the decision whether to enter a guilty plea is a personal choice that ultimately resides with the defendant. See, *e.g.*, *Jones*, 463 U.S. at 751; *Brookhart* v. *Janis*, 384 U.S. 1, 7 (1966).

Statements by counsel acknowledging the defendant's guilt, in contrast, do not effect a waiver of the right to a jury trial or to proof of guilt beyond a reasonable doubt, let alone supersede the need for a trial altogether. Notwithstanding an acknowledgment of guilt by counsel, the prosecution still must prove the defendant's guilt through competent evidence. Also, the defendant can seek to exclude evidence that is particularly prejudicial and can challenge his conviction on

appeal or post-conviction proceedings based on alleged errors in the trial. In this case, for instance, counsel objected to the introduction of photographs of the victim on the basis that they were unduly inflammatory, and respondent challenged his conviction on appeal on that ground. *Nixon*, 572 So. 2d at 1342-1343. A tactical concession of guilt by counsel thus is not the equivalent of a guilty plea. See *Gomes*, 177 F.3d at 84 ("Counsel's concession was not a guilty plea, which involves conviction *without proof*, and is therefore properly hedged with protections. Here, the government had to provide a jury with admissible evidence of guilt and did so in abundance."); *Bell*, 72 F.3d at 430; *Underwood*, 939 F.2d at 474.[8]

Contrary to the Florida Supreme Court's suggestion (Pet. App. 47a), moreover, counsel's strategy was not inconsistent with respondent's plea of not guilty. If the prosecution declines to exchange a non-capital sentence for a guilty plea, a defendant can rationally decide that it would further his interests to exercise his trial rights, see *ABA Death Penalty Guidelines* 10.9.2 cmt. (31 Hofstra L. Rev. at 1045), including if the trial strategy entails conceding guilt. If the trial is infected by error and the defendant obtains a mistrial or a reversal, the prosecution may be more willing at that point to bargain for a guilty plea rather than retry the case.

Additionally, if the defendant goes to trial instead of pleading guilty and moving immediately to sentencing,

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[8] This Court has drawn a similar distinction between the decision whether to appeal and decisions concerning the conduct of an appeal. Compare *Roe* v. *Flores-Ortega*, 528 U.S. 470, 477 (2000) (defendant has ultimate authority to decide whether to take an appeal), with *Smith* v. *Robbins*, 528 U.S. 259, 287 (2000) (counsel can decide tc forgo filing a brief on appeal based on reasonable determination that there are no meritorious grounds); and *Jones*, 463 U.S. at 751-752 (counsel has discretion to determine what issues to press on appeal and can focus "on one central issue" to the exclusion of others).

"[o]ften, the prosecutor will introduce no additional evidence at the penalty stage but simply will rely on aggravating factors arguably established by the evidence presented at the guilt stage." White, *supra*, at 344. The impact of the prosecution's aggravation case thus may be diminished by the time of the penalty phase, which will focus instead on the reasons for sparing the defendant's life. See Sundby, *supra*, at 1595; Goodpaster, *supra*, at 331-332. In this case, for instance, apart from incorporating by reference its guilt phase presentation, J.A. 102-103, the State's evidentiary case at sentencing consisted solely of introducing copies of the judgments of respondent's prior convictions and conducting a brief examination of one police officer, J.A. 103-106. As a result, counsel's strategy of acknowledging guilt was not incompatible with the decision to go to trial.

C. Counsel's Acknowledgment Of Guilt Without The Defendant's Explicit Consent Does Not Result In Prejudice Per Se

Even if trial counsel rendered deficient performance as a matter of law by pursuing his strategy without respondent's explicit consent, counsel's performance was not prejudicial per se. Cf. *Strickland*, 466 U.S. at 697 (explaining that courts need not address performance before prejudice and may dispose of claims on prejudice grounds when it is "easier" to do so). The general rule for establishing prejudice requires a defendant to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In certain narrow contexts, prejudice is presumed per se, *id.* at 692, including "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," *United States* v. *Cronic*, 466 U.S. 648, 659 (1984). The Florida Supreme Court erred in applying that exception in this case.

The Florida Supreme Court's conclusion that trial counsel performed deficiently was based, not on the merits of his strategy of acknowledging respondent's guilt, but on the pursuit of that strategy without respondent's explicit consent. The initial question in assessing whether that purported error was prejudicial, therefore, is whether the failure to obtain explicit consent triggers *Cronic*'s per se presumption of prejudice. If the client would have granted consent to a course of representation that the Florida Supreme Court acknowledged may have been in his best interests, counsel's failure to secure explicit consent could not have been prejudicial. See *Roe* v. *Flores-Ortega*, 528 U.S. 470, 477, 484 (2000) (addressing counsel's failure to file a notice of appeal where (as here) "the defendant has not clearly conveyed his wishes one way or the other," and holding that, if "the defendant cannot demonstrate that, but for counsel's deficient performance, he would have appealed, counsel's deficient performance has not deprived him of anything"). In this case, if respondent were unable to demonstrate that he would have withheld consent to proceed with counsel's strategy, "counsel's deficient performance has not deprived him of anything." *Id.* at 484. In view of the overwhelming evidence of respondent's guilt and the potential implications for the sentencing phase of mounting a futile or frivolous guilt-phase defense, there is no reason to assume that respondent would have withheld explicit consent.

More fundamentally, there is no warrant for concluding that counsel's concession of guilt in order to bolster arguments against a capital sentence amounted to an "entire[] fail[ure] to subject to the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659; see *Bell* v. *Cone*, 535 U.S. 685, 696-697 (2002) ("When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete," rather than a

"fail[ure] to do so at specific points."). The penalty phase of a capital trial "is in many respects a continuation of the trial on guilt or innocence of capital murder," *Monge* v. *California*, 524 U.S. 721, 732 (1998), and assessing the effect of representation must take into account the unique focus of the case on the possible imposition of the death sentence. A reasoned strategic judgment by counsel to concede guilt in order to bolster arguments against a capital sentence is the antithesis of a complete failure to "subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659. Far from an outright failure to test the prosecution's case, the strategy reflects a determination that the best way to *overcome* the prosecution's case for death is to acknowledge guilt and thereby enhance the case for leniency at sentencing.

The Florida Supreme Court erroneously focused on whether counsel's strategy entailed a failure of adversarial testing in the guilt phase alone. See Pet. App. 44a. That approach fails to appreciate that counsel aimed to pursue a coherent and consistent strategy across both phases of the trial: to avoid undermining arguments for leniency in the penalty phase, counsel sought to refrain from contesting respondent's guilt in the guilt phase. See Sundby, *supra*, at 1588-1589 ("[I]f the defense does not approach a capital case, even though it is bifurcated, as a unified presentation, it greatly increases the risk that the guilt-phase presentation will doom the case in mitigation during the penalty phase.").

This Court has not suggested that reasoned, tactical judgments of the sort at issue here could trigger *Cronic*'s per se presumption of prejudice. The purpose of that presumption is to address situations in which "the adversary process [is] itself presumptively unreliable." *Cronic*, 466 U.S. at 659. There could be no basis for concluding that a conviction is "presumptively unreliable" when the decision to acknowledge guilt derives from a considered assessment by counsel

that the evidence against the defendant is overwhelming. Insofar as counsel's assessment in that regard may be unreasonable in a particular case, it likely would result in a finding of prejudice under *Strickland*; but there is no warrant for applying *Cronic*'s across-the-board presumption. See *Smith* v. *Robbins*, 528 U.S. 259, 286-287 (2000) (concluding that *Cronic* presumption of prejudice is inapplicable to claim that counsel was ineffective in concluding that there were no meritorious arguments to be raised on appeal, because there is no reason to presume that counsel's assessment was erroneous).

Nor does this case present a situation in which a presumption of prejudice applies because counsel's deficient performance resulted in the denial of an "entire judicial proceeding." *Flores-Ortega*, 528 U.S. at 483. When counsel's errors "cause[] the defendant to forfeit a judicial proceeding to which he was otherwise entitled," *id.* at 485, there is no requirement that the defendant establish that, had the forfeited proceeding taken place, it would have produced a result in his favor. See *id.* at 484 (defendant alleging ineffective assistance based on counsel's erroneous failure to file a notice of appeal need not demonstrate that appeal would have been successful); *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985) (defendant alleging ineffective assistance in connection with advice concerning consequences of pleading guilty need not demonstrate that he would have prevailed had he gone to trial). That rule has no application here. A strategy of conceding guilt in the guilt phase in order to bolster arguments in the sentencing phase does not entail the complete forfeiture of a judicial proceeding. Instead, it reflects a tactical judgment concerning how best to conduct the entire proceeding.

Because a per se presumption of prejudice does not apply in this case, respondent must show a reasonable probability that, but for counsel's statements acknowledging his guilt,

the result of his trial would have been different. See *Holman*, 314 F.3d at 844-845 (applying *Strickland* and finding no prejudice from counsel's strategic acknowledgment of guilt); *Haynes*, 298 F.3d at 380-382 (explaining that *Strickland* rather than *Cronic* applies and finding no prejudice from counsel's tactical concession of guilt). The Florida Supreme Court did not engage that question. Consequently, if this Court were to conclude that counsel's failure to secure explicit consent were deficient performance, it should remand for a determination of prejudice.

CONCLUSION

The judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

THE STATE OF FLORIDA,

Petitioner,

vs.

JOE ELTON NIXON,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1) In a capital case in which there is overwhelming evidence of the defendant's guilt, is counsel's strategy to concede guilt in the opening and closing statements in the guilt phase trial ineffective assistance of counsel when the defendant consents to this approach?

2) Can the defendant's consent to counsel's strategy be implied rather than express?

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IN THE

Supreme Court of the United States

THE STATE OF FLORIDA,

Petitioner,

vs.

JOE ELTON NIXON,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case addresses the scope of the right to the effective assistance of counsel. The Florida Supreme Court's holding that a client's consent to trial counsel's strategy of conceding guilt in the opening and closing arguments must be express

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

dangerously overstates the Sixth Amendment right. The right to effective assistance of counsel is not a detailed code of conduct for criminal defense counsel. This decision requires an unrealistic level of formality between counsel and client, and its definition of consent is contrary to the accepted definition of that term. This needlessly threatens reliable convictions and may deter counsel from representing criminal defendants. The lost convictions and delays resulting from this overly broad definition of ineffective assistance of counsel are contrary to the interests of public safety and society that the CJLF was formed to serve.

SUMMARY OF FACTS AND CASE

"On Monday, August 13, 1984, the charred body of Jeanne Bickner was found tied to a tree in a wooded area in Leon County," Florida. *Nixon* v. *State*, 572 So. 2d 1336, 1337 (Fla. 1990) (*Nixon I*). Her car was found the next day in a Tallahassee drainage ditch, abandoned and burned. See *ibid.* That same day police received information from Nixon's girlfriend and his brother that Nixon had admitted to murdering Ms. Bickner, driving her car before burning it, and pawning two of her rings. See *ibid.* Nixon was arrested and "charged with first-degree murder, kidnapping, robbery, and arson." *Ibid.*

The case for Nixon's guilt was overwhelming. In addition to the confessions to his girlfriend and brother, Nixon was seen driving Ms. Bickner's car on the last day she was seen alive near where her body was found. See *id.*, at 1338. Nixon's palm print was found on the trunk of Ms. Bickner's car. See *ibid.* He also confessed to the police, telling them

> "how he met Ms. Bickner at the mall and asked her to take him to his uncle's house because he was having car trouble. Once on the road, Nixon hit Bickner in the face. When she stopped the car, Nixon put her in the trunk and then drove to a secluded wooded area where he took her from the trunk and tied her to a tree with jumper cables. According to Nixon, the two talked about their lives. Ms. Bickner offered to give Nixon money, to sign her car over to him, begging him not to kill her. Nixon recounted how he burned Ms. Bickner's personal belongings and then threw the top of the convertible into the fire. At some point after placing a paper bag over her head, Nixon threw the smoldering convertible top on Ms. Bickner, setting her on fire." *Ibid.*

Ms. Bickner was alive when she was set on fire, and she burned to death. See *ibid.*

In his opening statement, the defense counsel stated:

> "In this case, there will be no question that Jeannie [sic] Bickner died a horrible, horrible death. Surely she did and that will be shown to you. In fact, that horrible tragedy will be proved to your satisfaction beyond any reasonable doubt.
>
> "In this case, there won't by any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie [sic] Bickner's death. Likewise, that fact will be proved to your satisfaction beyond any reasonable doubt. This case is about the death of Joe Elton Nixon and whether it should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement." *Id.*, at 1339.

Defense counsel's closing argument contained the following passage:

> "Ladies and gentlemen of the jury, I wish I could stand before you and argue that what happened wasn't caused by Mr. Nixon, but we all know better. For several very obvious and apparent reasons, you have been and will continue to be involved in a very uniquely tragic case. In just a little while Judge Hall will give you some verdict forms that have been prepared. He'll give you some instructions on how to deliberate this case. After you've gotten those forms and you've elected your foreperson and you've done what you must do, you will sign those forms.

> I know you are not going to take this duty lightly, and I know what you will decide will be unanimous. I think that what you will decide is that the State of Florida, Mr. Hankinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson." *Ibid.*

Nixon was convicted of all charges and sentenced to death. See *id.*, at 1338.

On his direct appeal, Nixon attacked his conviction and sentence on several grounds, including a claim that the opening and closing statements were *per se* ineffective assistance of counsel under *United States* v. *Cronic*, 466 U. S. 648 (1984). See *Nixon*, 572 So. 2d, at 1338-1339. The Florida Supreme Court remanded the case to the trial court for a hearing to determine whether Nixon was informed of trial counsel's strategy in the opening and closing statements. See *ibid.*

The trial court made several findings. First, it found that trial counsel reviewed the defense with Nixon, including "the probability that he would concede the killing of the victim by Nixon." It also concluded that trial counsel and Nixon had prior attorney-client relationships, were both veterans of the justice system, and that Nixon understood what was happening. Since Nixon did not object to the strategy, see *id.*, at 1340, n. 3, the trial court then concluded that Nixon had not met his burden of proving that he did not know or consent to the trial strategy. See *ibid.* The Florida Supreme Court felt that this record was insufficient to rule on the ineffective assistance of counsel claim and therefore dismissed it without prejudice to raising it again on state collateral review. See *id.*, at 1340. Nixon's other claims were rejected, and his convictions and sentences were affirmed.

Nixon then raised his ineffective assistance claim in a motion for state post-conviction relief, which the trial court

denied without an evidentiary hearing. See *Nixon* v. *Singletary*, 758 So. 2d 618, 619 (Fla. 2000) (*per curiam*) (*Nixon II*). Nixon appealed this decision to the Florida Supreme Court and also filed an original habeas petition there. See *ibid.* The State asked the Court to examine counsel's opening and closing arguments under the traditional ineffective assistance standard of *Strickland* v. *Washington*, 466 U. S. 668 (1984), while Nixon argued that the *per se* ineffective assistance standard of *Cronic* was appropriate. See *Nixon II*, *supra*, at 621.

The court applied *Cronic*. Since the defendant has ultimate control over whether to plead guilty, see *id.*, at 623, and the court considered counsel's action to be the equivalent of a guilty plea, it reasoned that "the dispositive issue in this case is whether Nixon gave his consent to trial counsel to concede guilt during the guilt phase of the trial." *Id.*, at 624. The Florida Supreme Court's efforts to obtain the facts regarding Nixon's consent were hindered by his invocation of the attorney-client privilege. See *ibid.* The Court remanded for yet another evidentiary hearing on consent, this time making it clear that, by placing the effectiveness of his attorney at issue, Nixon had waived the privilege. See *id.*, at 624-625. This is well-established law. "Where the client alleges a breach of duty by the attorney, the privilege is waived to all communications relevant to that issue." See 8 J. Wigmore, Evidence § 2327, p. 638 (McNaughton rev. 1961); see also Restatement (Third) of the Law Governing Lawyers § 80, p. 608 (2000); 1 J. Strong, McCormick on Evidence § 91, pp. 367-368 (5th ed. 1999); Developments in the Law—Privileged Communications, 98 Harv. L. Rev. 1450, 1637-1638 (1985).

Nixon did not testify at this hearing, but his trial counsel did. See *Nixon* v. *State*, 857 So. 2d 172, 175 (Fla. 2003) (*per curiam*) (*Nixon III*). During trial counsel's testimony, the following exchange took place:

> "Q: [Nixon's Postconviction Counsel] Did you discuss the strategy of not contesting guilt with the defendant?

"A: [Corin [Nixon's trial counsel]] I thought I answered it. But if I didn't answer it, then yes, he was advised as to that, yes.

"Q: And how did he respond?

"A: To the best of my knowledge, again he did nothing, except after it occurred that he was not real pleased. And I think I answered that before also.

"Q: Now what do you mean by he did nothing?

"A: He did nothing. I don't know. I don't know what else I can say, Mr. Evans. I have said it before." *Ibid.*

Trial counsel also testified "that Nixon provided neither verbal nor nonverbal indication that he did or did not wish to pursue counsel's strategy of conceding guilt." *Id.*, at 175-176. Trial counsel's testimony "essentially mirrored his testimony given at the December 19, 1988 evidentiary hearing, at which Nixon invoked the attorney-client privilege." The Florida Supreme Court concluded that "both the direct and cross-examination of [trial counsel] Corin were extremely limited." *Id.*, at 176, n. 8. The trial court again found that Nixon had consented to counsel's trial strategy and denied relief. See *id.*, at 175.

The Florida Supreme Court reversed. Since trial counsel's opening and closing arguments "were the functional equivalent of a guilty plea" there had to be substantial evidence "that Nixon did more than silently submit to counsel's strategy" before this ineffective assistance claim could be dismissed. *Id.*, at 176. Since this evidence did not exist, Nixon's conviction was vacated on the ground of ineffective assistance of counsel. See *ibid.* This Court granted certiorari on March 1, 2004.

SUMMARY OF ARGUMENT

The presumption of prejudice found in *United States* v. *Cronic* is a rare exception to the general rule that the defendant

must prove substandard conduct by counsel that prejudiced the defense. In this case, *Cronic*, if applicable, would act as a substitute for the prejudice component of *Strickland* v. *Washington*. Since the prejudice and substandard conduct components play important roles in protecting the system from excessive ineffective assistance claims, *Cronic* only applies to nearly total breakdowns of the adversarial system. Therefore, *Cronic* can only apply to Nixon's claim, if counsel's action was the equivalent of a guilty plea. Since a guilty plea is valid with the client's consent, Nixon's consent to the trial strategy would extinguish his *Cronic* claim. If *Cronic* does not apply, then consent also rebuts any claim of ineffective assistance under *Strickland* v. *Washington*.

Cronic's presumption of prejudice changes but does not eliminate the defendant's burden of proof. Any circumstances of the case that would support applying *Cronic* must still be pled and proven by the defense. This includes Nixon's lack of consent, which is information uniquely within his control, and is therefore appropriate for him to bear the burden of proving.

The Florida Supreme Court's conclusion that Nixon's waiver must be express contradicts both the law governing consent and the right to the effective assistance of counsel. Implied consent is appropriate in other constitutional contexts, such as the waiver of the presence of counsel under *Miranda* v. *Arizona*. Because it lacks the adversarial posture of the interrogation room, the relationship between client and counsel supports an even more expansive view of implied consent than the one found in *Miranda*. Any attempt to graft the formality of a guilty plea onto the consent between client and counsel in this case misconstrues that relationship and the nature of the guilty plea.

The Florida Supreme Court's one-size-fits-all approach to consent contradicts the cases governing ineffective assistance of counsel. These cases recognized that the Sixth Amendment does not create a set of detailed guidelines for counsel to

follow. Rather, courts must examine each case on its own facts.

The trial court correctly found that Nixon implicitly consented to trial counsel's strategy. It relied on Nixon's burden of proving a lack of consent, counsel's consultation with Nixon about the strategy, and Nixon's failure to communicate any disapproval. Nothing more is necessary to find a valid consent to trial counsel's strategy.

ARGUMENT

I. Nixon has the burden of proving that he did not consent to counsel's trial strategy in order to succeed under either *Cronic* or *Strickland*.

A. Cronic and Strickland.

In order for Nixon to prevail in this case, he must prove that he did not consent to trial counsel's concession of guilt in the opening and closing statements. Nixon's claim is that *United States* v. *Cronic*, 466 U. S. 648 (1984) governs this case. See *Nixon II*, 758 So. 2d, at 621. The Florida Supreme Court adopted Nixon's argument because it equated trial counsel's opening and closing statements with a guilty plea. See *id.*, at 623-624. It then concluded that since trial counsel's strategy was equal to a guilty plea, *Cronic*'s presumption of prejudice would prevail unless Nixon consented to the strategy. See *id.*, at 624. While the trial strategy was not equal to a guilty plea, see *infra*, at 18-19, the Florida Supreme Court correctly placed consent at the center of its analysis. Nixon's consent to trial counsel's plan will eliminate any ineffective assistance claim in this case, whether it is made under *Cronic* or under *Strickland* v. *Washington*, 466 U. S. 668 (1984).

Cronic is a narrow exception to the general rule governing ineffective assistance of counsel claims. Counsel is presumptively competent, and the accused has the burden of overcoming this presumption. See *Cronic*, 466 U. S., at 658. This

normally requires the accused to prove that counsel's performance was deficient, and that the deficiency "prejudiced the defense." *Strickland*, 466 U. S., at 668. The accused can only prevail by carrying the burden of proving that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Ibid.* *Cronic* is simply a rule of convenience. *Strickland*'s test is unnecessary under certain extreme circumstances. Where the circumstances of the defendant's representation are so clearly prejudicial to the defense that "the cost of litigating their effect in a particular case is unjustified," *Cronic*, *supra*, at 658, *Cronic*'s presumption of prejudice is appropriate. See *id.*, at 659-660.

B. Consent and Counsel.

The *Cronic* rule is reserved for the nearly complete breakdown of the adversarial process. The "obvious" example "is the complete denial of counsel." See *id.*, at 659. The presumption also applies where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing . . . ." *Ibid.* For example, a complete inability to effectively cross-examine prosecution witnesses would come under this definition. See *ibid.* Finally, other circumstances that would prevent any counsel from rendering effective assistance, like the circumstances surrounding the infamous "Scottsboro boys" trial, see *Powell* v. *Alabama*, 287 U. S. 45 (1932),[2] warrants a presumption of prejudice. See *Cronic*, *supra*, at 660.

Depending upon the circumstances of the case, applying *Cronic* will substitute its standard for the prejudice requirement

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2. In *Powell*, the defendants were indicted for a highly publicized capital offense and faced considerable racial animosity from the community. See 287 U. S., at 50-51. On the day of the trial, a Tennessee lawyer told the court that he was appearing on behalf of people "interested" in the defendants, but that he was in no way prepared to represent them. *Id.*, at 55. The trial court decided that the Tennessee lawyer would represent the defendants with whatever help the local bar could provide, and then immediately started the trial. See *id.*, at 56-58.

or for both the prejudice and the attorney misconduct components of *Strickland*. For instance, it is pointless to apply either part of the *Strickland* test to a failure to provide counsel. Similarly, the circumstances surrounding the representation in *Powell* substitute both for prejudice and attorney misconduct. In such a case, "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not, the defendant need not show that the proceedings were affected." *Bell* v. *Cone*, 535 U. S. 685, 696 (2002). In other cases, the defendant will not have to show prejudice, but still must prove some form of misconduct in order to prevail under *Cronic*. *Cronic*'s second example of representation that fits its presumption, where "counsel entirely fails to subject the prosecutor's case to meaningful adversarial testing," 466 U. S., at 659, still requires the defendant to prove substandard conduct. While prejudice is presumed, the defendant must still prove attorney misconduct in the form of the complete failure to test the prosecution's case.

If *Cronic* applies to this case, it would come under the failure to test the prosecution's case theory. See *Nixon II*, 758 So. 2d, at 622. While applying *Cronic* to Nixon's claim would make a prejudice inquiry unnecessary, Nixon must still show that counsel's decision to concede guilt was improper. A concession of guilt in the guilt phase of a capital trial, if properly consented to by the defendant, is not substandard representation. See *infra*, at 24-25. Therefore, if Nixon consented to counsel's strategy, then *Cronic* cannot apply to his claim. This conclusion follows from an understanding of right to effective assistance of counsel and *Cronic*'s role in administering claims under that right.

The overwhelming majority of trials do not involve the complete breakdown of the adversarial process contemplated in *Cronic*. The facts of *Cronic* itself provide one example. Cronic was facing a variety of mail fraud charges, and retained counsel withdrew shortly before the scheduled trial date. See 466 U. S., at 649. Counsel was appointed for Cronic, but was

allowed only 25 days to prepare. See *ibid.* The government's investigation was complex, taking four and one-half years and involving the review of thousands of documents. See *ibid.* Appointed counsel was "a young lawyer with a real estate practice . . . ." *Ibid.* The circumstances of Cronic's representation did not support a presumption of prejudice, because it was not "unlikely that the defendant could have received the effective assistance of counsel." *Id.*, at 666. Absent a showing of "specific errors made by trial counsel" Cronic's conviction would stand. See *ibid.*

While necessary, attack on judgments for effective assistance of counsel contains real risks to the criminal justice system. The *Strickland* Court understood that an overly broad definition of ineffective assistance could backfire. A standard permitting an intrusive inquiry into counsel's performance or a set of "detailed guidelines for evaluation would encourage the proliferation of ineffectiveness challenges." *Strickland*, 466 U. S., at 690. If this were allowed, then any conviction would be followed by a trial of counsel's representation of the defendant. See *ibid.* This could only adversely affect counsel's "performance and even willingness to serve . . . ." *Ibid.* Both parts of the *Strickland* standard are designed to prevent such consequences. Review of counsel's actions is "highly deferential" under *Strickland*. *Id.*, at 689. Counsel's performance does not have to be optimal; under *Strickland* it only needs to be reasonable. See *id.*, at 688. The prejudice component is also meant to prevent the right to effective assistance from damaging the system. The right to effective assistance of counsel does not exist for its own sake, but to guarantee a fair trial. See *Roe* v. *Flores-Ortega*, 528 U. S. 470, 482 (2000) (quoting *Cronic*, 466 U. S., at 658). Requiring the defendant to prove prejudice helps to prevent the Sixth Amendment from becoming a vehicle for correcting attorney errors. All lawyers make mistakes, but only prejudicial mistakes warrant setting aside convictions.

The states and the federal government have a substantial interest in preserving the integrity of their convictions.

> "Retrying defendants whose convictions are set aside also imposes significant 'social costs,' including the expenditure of additional time and resources for all the parties involved, the 'erosion of memory' and 'dispersion of witnesses' that accompany the passage of time and make obtaining convictions on retrial more difficult, and the frustration of 'society's interest in the prompt administration of justice.' " *Brecht* v. *Abrahamson*, 507 U. S. 619, 637 (1993) (quoting *United States* v. *Mechanik*, 475 U. S. 66, 72 (1986)) (internal quotation marks omitted by *Brecht* Court).

Similarly, the doctrine of harmless constitutional error is based upon the importance of preserving convictions even in the face of error by state actors. See *ibid.* (finding error harmless on federal habeas unless it had a substantial effect on the verdict); *Chapman* v. *California*, 386 U. S. 18, 24 (1967) ("harmless beyond a reasonable doubt" on direct review). Errors which are susceptible to harmless error are deemed " 'trial error.' " See *Arizona* v. *Fulminante*, 499 U. S. 279, 307 (1991). They "occur[ ] during the presentation of the case to the jury," making them susceptible to harmless error analysis because they "may . . . be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless . . . ." *Id.*, at 307-308. Error that goes to the structure of the "trial mechanism" is incapable of this type of analysis. See *id.*, at 309-310. Such defects, like the complete deprivation of the right to counsel, "infect the entire trial process." *Brecht*, 507 U. S., at 629-630.

Strickland's prejudice requirement is analogous to a harmless error requirement. If the erroneous representation does not have a sufficient impact on the verdict, then the conviction will stand. *Strickland* differs from traditional harmless error analysis by affording greater protection to convictions. Although similar in kind, *Strickland*'s hurdle is higher than *Brecht*'s. See *Kyles* v. *Whitley*, 514 U. S. 419, 439

(1995). In addition, while the prosecution carries the burden of proving harmless error on direct review, see *id.*, at 630, the defendant bears the burden of proving prejudice under *Strickland*. See *Strickland*, 466 U. S., at 696.

Since *Cronic* suppresses this important limit on ineffective assistance claims, it should be limited to the most extreme cases. Thus, an "attorney's failure to test the prosecutor's case . . . must be *complete*" for *Cronic* to apply. *Bell* v. *Cone*, 535 U. S., at 697 (emphasis added). For example, the failure to present any mitigating evidence or closing argument in the penalty phase of a capital trial is analyzed under *Strickland* instead of *Cronic*. See *id.*, at 697-698. Whether *Strickland* or *Cronic* applies depends upon "the magnitude of the deprivation of the right to effective assistance of counsel." *Roe*, 528 U. S., at 482. The difference between *Strickland* and *Cronic* is "not of degree but of kind." *Bell*, 535 U. S., at 697. In order for Nixon's representation to qualify for *Cronic*'s presumption, it must be orders of magnitude more prejudicial than mere attorney error.

Because *Cronic* is so unusual and severe, Nixon's consent to counsel's strategy would eliminate his *Cronic* claim. The worst characterization of trial counsel's conduct is that it was a slow guilty plea. If counsel's actions are not comparable to a guilty plea then *Cronic* does not apply. Whether to plead guilty is a decision left to the exclusive control of the defendant. See *Jones* v. *Barnes*, 463 U. S. 745, 751 (1983). Since the defendant controls this decision, an informed and voluntary consent to counsel's strategy ratifies it, making *Cronic* inapplicable.

Flores-Ortega illustrates this point. Counsel failed to file a notice of appeal which led to a loss of the accused's right to appeal his conviction. See 528 U. S., at 474. While a failure to file an appeal requested by the defendant is "professionally unreasonable . . . a defendant who explicitly tells his attorney *not* to file an appeal cannot later complain that" no appeal was filed. *Id.*, at 477 (emphasis in original). Even though filing an

appeal usually cannot harm the defendant, failing to do this is not ineffective assistance if the client consents. While denial of a desired appeal is presumptively prejudicial, see *id.*, at 483, consent ends the *Cronic* issue. Similar reasoning is appropriate here.

Cronic's presumption changes but does not eliminate the defendant's initial burden of proof. The presumption of ineffective assistance comes from certain circumstances of the case which support a presumption that the fairness of the trial was undermined. See 466 U. S., at 658 ("circumstances that are so likely to prejudice"); *id.*, at 659 ("circumstances of that magnitude"); *id.*, at 661 ("the surrounding circumstances"). Simply alleging these circumstances cannot trigger the irrebuttable presumption that vacates a conviction. These circumstances must be pled and proven by the defendant before *Cronic*'s presumption applies.

In this case, Nixon must prove trial counsel's opening and closing statements along with his lack of informed consent. Since consent would end the ineffective assistance claim before the *Cronic* presumption would apply, it is sensible to address this issue first. The extent of Nixon's prior consent to trial counsel's approach in the opening and closing statements is *only* known to Nixon and his trial counsel. "[T]he burden of proving a particular fact is said to be put on the *party who presumably has peculiar means of knowledge*. . . ." 9 J. Wigmore, Evidence § 2486, p. 290 (Chadbourn rev. 1981) (emphasis in original); *Campbell* v. *United States*, 365 U. S. 85, 96 (1961) ("the ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary"). Since Nixon was raising his claim to overturn his conviction, the case for placing the burden of proving a lack of consent on him is compelling. "[T]he general rule [is] that one seeking relief bears the burden of demonstrating that he is entitled to it." *Clark* v. *Community for Creative Nonviolence*, 468 U. S. 288, 293, n. 5 (1984).

If Nixon does not carry his burden of proving that he did not consent to trial counsel's strategy, then his Sixth Amendment claim fails. If *Cronic* does not apply, then at most he can allege that trial counsel's strategy was deficient and prejudicial under *Strickland*. Consent also eliminates this means of relief. A necessary condition for a *Strickland* claim is that counsel's representation is substandard. See 466 U. S., at 687. If Nixon consented to what is at worst a guilty plea, he did not receive objectively unreasonable assistance of counsel. Communications between counsel and client can provide crucial support for the reasonableness of counsel's actions. While most decisions about the conduct of the trial are left to counsel, see *Taylor* v. *Illinois*, 484 U. S. 400, 417-418 (1988), a client's informed consent to a particular tactic or strategy should be dispositive under *Strickland*. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Strickland*, *supra*, at 691. If a case goes to trial, then the client will often play an important role in determining trial strategy. See *Godinez* v. *Moran*, 509 U. S. 389, 398 (1993). An informed consent to a strategy discussed between counsel and client should be binding on any defendant making a *Strickland* claim. If the client gives an informed consent to a particular approach to the defense, then that approach is necessarily reasonable under *Strickland*. Therefore, a failure to prove the absence of consent ends Nixon's ineffective assistance of counsel claim.

II. A client's consent to trial counsel's strategy can be implied from the circumstances of the case.

The Florida Supreme Court held that consent to trial counsel's strategy would be valid only if there is "substantial evidence which establishes that Nixon *affirmatively* and

explicitly agreed to counsel's strategy." *Nixon III*, 857 So. 2d, at 176 (emphasis in original) (Nixon III). This asks too much of the relationship between counsel and client. Requiring this level of formal proof is contrary to the standard approach to the consent issue, and is also at odds with this Court's understanding of the guarantee of effective assistance of counsel. Upholding implied consent in relations between client and counsel does no disservice to the defendant's right to counsel. Instead, it recognizes that consent comes in many forms and that the relationship between client and counsel cannot be defined by rigid formalities.

Consent is normally determined by examining the totality of the circumstances. See *United States* v. *Drayton*, 536 U. S. 194, 207 (2002) (consent to search). Constitutional rights can be waived by implication, and a court can infer waiver after examining all relevant circumstances. See *North Carolina* v. *Butler*, 441 U. S. 369, 373 (1979). "Even when a right so fundamental as that to counsel at trial is involved, the question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.' " *Id.*, at 374-375 (quoting *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938)). This applies to other forms of consent, such as consent to search. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 226-227 (1973). The trial court correctly looked to Nixon's relationship with counsel and the other facts surrounding this case before determining that there was consent. See Part III, *infra*. The Florida Supreme Court's decision to ignore these circumstances and apply a bright-line rule contradicts the proper approach to consent.

Consent is not normally susceptible to bright-line rules. "There is no bright line test for determining consent; each is a question of fact to be determined from the totality of the circumstances." *United States* v. *Muldrow*, 19 F. 3d 1332, 1336 (CA10 1994). *Butler* addressed whether *Miranda* v. *Arizona*, 384 U. S. 436 (1966) required an explicit waiver of

the suspect's right to the presence of counsel. See 441 U. S., at 370. Under *Miranda*, an explicit waiver was acceptable, but mere silence after *Miranda* warnings would not prove waiver. See *id.*, at 373. While an express waiver is "usually strong proof of the validity of that waiver . . . it is not inevitably either necessary or sufficient to establish waiver." *Ibid.* The waiver issue could not be decided by applying a bright-line rule. "The question is not one of form, but rather whether the defendant knowingly and voluntarily waived the rights delineated in the *Miranda* case." *Ibid.* Under this holistic approach, courts must always look to all of the surrounding facts and circumstances of the case. Even silence could support a waiver under the appropriate circumstances.

> "As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." *Ibid.*

The case for an implied waiver is much stronger in the context of an attorney-client relationship than in *Miranda*'s interrogation room. *Miranda* deals with a situation where the suspect "is not in the presence of persons acting solely in his interest." 384 U. S., at 469. It is therefore understandable that the government has a "heavy burden" of proving waiver under *Miranda*. See *id.*, at 475. The relationship between counsel and client is much different, and therefore consent should be more readily inferred.

Counsel and client are allies rather than adversaries. Counsel has a duty to represent the client with an undivided loyalty. See *Cuyler* v. *Sullivan*, 446 U. S. 335, 346 (1980). A lawyer is the client's advocate and adviser, see *United States* v. *Ash*, 413 U. S. 300, 312 (1973), not an adversary. Since the

client has the burden of proving that counsel rendered ineffective assistance under *Strickland* v. *Washington*, 466 U. S. 668 (1984) and *United States* v. *Cronic*, 466 U. S. 648 (1984), it is appropriate to require the defendant to prove a lack of consent when contesting counsel's representation. See *supra*, at 14-15. A rule against implied consent is simply inconsistent with the reality of the relationship between client and counsel.

Counsel's consultation with Nixon, and Nixon's lack of objection to the strategy, also distinguishes *Brookhart* v. *Janis*, 384 U. S. 1 (1966). In that case counsel agreed to a trial by a "prima facie trial," a procedure where the defense agrees not to put evidence on or cross-examine any prosecution witnesses. See *id.*, at 6-7. The defendant stated in open court that he did not consent to any guilty plea. *Id.*, at 6. This Court held that counsel cannot enter what is the equivalent to a guilty plea against the express wishes of his client not to plead guilty. See *id.*, at 7. *Brookhart* was also cited by *Cronic* as an example of a complete failure to test the prosecution's case. See 466 U. S., at 659. Since *Nixon* never explicitly stated any objection to counsel's strategy at any point during the trial, *Brookhart* is inapplicable.

Guilty pleas do require a higher level of formality, see *Boykin* v. *Alabama*, 395 U. S. 238, 242 (1969), and the Florida Supreme Court did invoke *Boykin* in support of its decision. See *Nixon II*, 758 So. 2d, at 624. This overstates the effect of trial counsel's strategy and understates the effect of a guilty plea. A guilty plea waives numerous rights, including the self-incrimination privilege, the right to jury trial and the right to confrontation. See *Boykin*, *supra*, at 243. Given these consequences, silence coupled with a bare record is insufficient to establish the consent that due process requires. See *id.*, at 242-243. Counsel's opening and closing statements may waive the self-incrimination privilege, a right that Nixon had already waived in each of his confessions to the police, but Nixon and counsel could still confront witnesses, and a jury still had to render a guilty verdict. Unlike a guilty plea, trial counsel's

strategy did not end the guilt phase of the trial. Nixon's attorney still conducted an active defense of his client. As the dissent in the second Florida Supreme Court opinion noted:

> "Even though Nixon was voluntarily absent from much of the trial, Nixon's trial counsel actively engaged in the trial, including conducting an extensive voir dire, objection to photographs as unduly gruesome, and moving for a mistrial as to a portion of the State's closing in the guilt phase. In the penalty phase, Nixon's trial counsel presented the testimony of eight witnesses, including Nixon's mother and two mental health experts, a psychiatrist, and a psychologist. Nixon's trial counsel introduced substantial documentary evidence, including school, institution, and psychological reports concerning Nixon's life from 1972 to 1985." *Nixon II*, 758 So. 2d, at 630-631 (Wells, J., dissenting).

Where counsel cross-examines the prosecution witnesses, the defendant did not give up a jury trial, and the defendant did not testify, there is no guilty plea, even if counsel concedes guilt. See *Abshier* v. *State*, 28 P. 3d 579, 595 (Okla. Crim. App. 2001).

Boykin held that the waiver of rights in a guilty plea could not be presumed from a silent record. See 395 U. S., at 242. The trial court's ruling in the present case was drawn from the totality of the circumstances of a record that was not silent. See *Nixon III*, 857 So. 2d, at 176. *Boykin* also relied on the federal standard for guilty pleas, which drew its definition of waiver from *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938), see *Boykin*, *supra*, at 243, n. 5, and the *Zerbst* standard requires courts to look to the totality of circumstances when examining a waiver. See 304 U. S., at 464. *Boykin*'s formalities should not be used to ignore a valid consent that can be found from the record.

Boykin's colloquy between judge and defendant, see *Parke* v. *Raley*, 506 U. S. 20, 30 (1992), is designed to provide a public record that the guilty plea was knowing and voluntary.

See *Bordenkircher* v. *Hayes*, 434 U. S. 357, 362 (1978); see also *Boykin*, 395 U. S., at 242 ("The requirement that the prosecution spread on the record the prerequisites of a valid waiver . . ."). In a case involving overwhelming evidence of guilt and where counsel presents a minimal defense or concedes guilt, *Boykin* is not necessary so long as there is a trial. The California Supreme Court came to this conclusion when applying California's version of *Boykin*, *In re Tahl*, 1 Cal. 3d 122, 460 P. 2d 449 (1969), overruled on other grounds, *Mills* v. *Municipal Court*, 10 Cal. 3d 288, 307, 515 P. 2d 273, 286 (1973). Like *Boykin*, "*Tahl* and its offspring" are intended to provide a record that the guilty plea was knowing and intelligent. See *People* v. *Murphy*, 8 Cal. 3d 349, 366, 503 P. 2d 594, 606 (1972).

> "Nothing in our decisions following *Tahl* indicates that the principles expressed therein were intended to apply to jury trials, even where the evidence of guilt is overwhelming. When a defendant undergoes a jury trial any competent defense counsel will inform him of his right to call witnesses on his own behalf, of his right to testify or not to testify, and, in the absence of unusual circumstances, will cross-examine the witnesses for the prosecution. Here, defendant's case was tried to a jury. Through counsel he clearly exercised his right of confrontation by cross-examining prosecution witnesses and he took advantage of his right against self-incrimination by not taking the witness stand." *Ibid.*

The present case is no different. The record establishes that trial counsel consulted with Nixon about the strategy, and there was a jury trial in which Nixon did not take the stand, and in which prosecution witnesses were cross-examined. No more is needed to distinguish *Boykin*.

It is impractical to impose the formal question and answer process required by *Boykin* on agreements between client and counsel. "There are countless ways to provide effective assistance in a given case," *Strickland*, 466 U. S., at 689, and

each defendant will have individual preferences in communicating with counsel. The one-size-fits-all rule imposed by the Florida Supreme Court improperly turns the Sixth Amendment into a code of conduct for criminal defense counsel.

> "But we have consistently declined to impose mechanical rules on counsel—even when those rules might lead to better representation—not simply out of deference to counsel's strategic choices, but because 'the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, . . . [but rather] simply to ensure that criminal defendants receive a fair trial.' " *Roe* v. *Flores-Ortega*, 528 U. S. 470, 481 (2000) (quoting *Strickland*, 466 U. S., at 689).

Accepting a client's implied consent to trial counsel's strategy is consistent with *Flores-Ortega*. That decision addressed whether "counsel [is] deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other." *Id.*, at 477. This question was best answered by answering another question, "whether counsel in fact consulted with the defendant about an appeal." *Id.*, at 478. Consultation has a specific meaning in this context, "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Ibid.* Proper consultation allows the right to appeal to be waived by implication. If the defendant is consulted in this manner, then "[c]ounsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." *Ibid.*

Similar reasoning applies to this case. A decision not to file a notice of appeal is more difficult to defend than trial counsel's representation of Nixon. The failure to file in *Flores-Ortega* forfeited the entire proceeding. See *id.*, at 483. Nixon's guilt phase trial was not forfeited. Rather, it was part of an effort to win the only proceeding in which Nixon had a reasonable chance to prevail, the penalty phase. If trial counsel explained

his trial strategy to Nixon, and Nixon did not object to it, then there was consent.

III. The trial court correctly found that Nixon consented to trial counsel's strategy.

The trial court took the correct approach to determining whether Nixon consented to trial counsel's strategy. At the last evidentiary hearing, trial counsel testified that he discussed the strategy of not contesting guilt with the defendant and that Nixon did nothing after being advised of this. See *Nixon* v. *State*, 857 So. 2d 172, 175 (Fla. 2003) (*per curiam*). The trial court noted that it considered all of the appropriate circumstances before it issued its conclusion. See *id.*, at 176. An important factor was "that Nixon's pattern of interactions with counsel involved information being provided by [counsel], followed by silence from Nixon. In essence, the trial court found that Nixon's failure to approve or disapprove verbally was approval of counsel's strategy." *Ibid.* The trial court's conclusion follows the approach of *Roe* v. *Flores-Ortega*, 528 U. S. 470 (2000). Since consultation and silence is sufficient to bar an ineffective assistance claim under that decision, see *supra*, at 21, the same result is appropriate here.

Any doubts about the trial court's conclusion are resolved in its findings after the first evidentiary hearing. In its February 1, 1989 order, the trial court made three findings:

> "1. Trial Defense Counsel Corin reviewed with Defendant/Appellant Nixon the defense approach to the case in general terms including, but not limited to, the probability that he would concede the killing of the victim by Nixon.
>
> "2. Corin and Nixon had previous attorney-client relationships, both were veterans of the criminal justice system and although Nixon manifested no reaction, he understood what was to take place.

> "3. Nixon made no objection and did not protest the strategy and tactic employed at trial.
>
> "Based on the foregoing, this Court concludes that the Defendant/Appellant Nixon has not sustained his burden of proof by the applicable standard that he (a) was neither informed nor knew of the trial strategy and tactic employed by Defense Trial Counsel Corin nor (b) did not consent thereto or (c) acquiesce therein." *Nixon I*, 572 So. 2d, at 1340.

This is the correct approach to this case. It notes the defendant's burden of proving that he did not consent, and draws the appropriate conclusion from the consultation and silence. Nothing more was needed. The Florida Supreme Court's decision to ignore these findings and force trial counsel into a particular approach to communicating with the client cannot be squared with any reasonable definition of consent or effective assistance of counsel.

Nixon's trial counsel was faced with an unusually difficult case. The evidence of his client's guilt was overwhelming, and the crimes were horrific. See *supra*, at 2-3. In addition, he had a very difficult and uncommunicative client. See *Nixon III*, 857 So. 2d, at 187-188 (Wells, J., dissenting). "If the mouthpiece has no trumpet, blowing with all one's might will not tear down any walls." *Gerlaugh* v. *Stewart*, 129 F. 3d 1027, 1043 (CA9 1997). Conceding guilt in order to make a favorable impression with the jury in the penalty phase is an acceptable trial strategy. See *Abshier* v. *State*, 28 P. 3d 579, 594 (Okla. Crim. App. 2001). In a near hopeless situation like this "candor may be the most effective tool available to counsel." *People* v. *Mayfield*, 5 Cal. 4th 142, 177, 852 P. 2d 331, 343-344 (1993).

The hazards of sacrificing credibility in the jury's eyes by contesting hopeless points are well known to trial lawyers. "In any lawsuit, there are several potential issues .... Pick the best of these issues, and fight hard on this issue. Offer no resistance on other issues. By conceding these other issues and focusing

on the issue you have chosen, you are increasing your credibility in the eyes of jurors." S. Easton, How to Win Jury Trials: Building Credibility with Judges and Jurors § 1.05, p. 6 (ALI-ABA 1998).

Although a Florida capital trial is bifurcated, see *Espinoza* v. *Florida*, 505 U. S. 1079, 1080 (1992) (*per curiam*), it is still one trial before one jury. While the distinction between elements of the offense and sentencing factors is important in the law, see *Ring* v. *Arizona*, 536 U. S. 584, 609 (2002), that distinction is not important to jurors, and hence it is not important to the strategy of arguing to the jury. A loss of credibility from contesting incontestable facts in the guilt phase can carry over to the penalty phase. "It is not good to put on a 'he didn't do it' defense and a 'he is sorry he did it' in mitigation. This just does not work. The jury will give the death penalty to the client and, in essence, the attorney." Lyon, Defending the Death Penalty Case: What Makes Death Different?, 42 Mercer L. Rev. 695, 708 (1991).

Nixon's trial counsel was faced with a guilt case "that absolutely cannot be won." See *id.*, at 709. Between the forensic evidence, Nixon's possession of the spoils, and his confessions to people close to him as well as the police, there was no doubt of his guilt of felony murder and of death-eligible circumstances. The only real issue in this case was the sentence selection decision between death and life in prison. Although the judge is the final sentencer in Florida, judicial override of a jury recommendation of life is permitted there only in extreme circumstances. See *Harris* v. *Alabama*, 513 U. S. 504, 524 (1995) (Stevens, J., dissenting). Preserving credibility before the jury, even at the expense of admitting the incontestable proof of guilt, was a valid strategy for winning on the only winnable issue, as the trial judge in this case noted. See *Nixon II*, 758 So. 2d, at 630 (Wells, J., dissenting).

Counsel's decision to inform Nixon of his strategy and Nixon's implicit acquiescence is sufficient to establish his consent to this valid strategy. Nixon received a vigorous

defense, and the guilty verdict is reliable. The Sixth Amendment guarantees a fair trial, not a perfect one. Nixon got his fair trial, and he cannot now attack the result.

CONCLUSION

The decision of the Florida Supreme Court should be reversed.

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Respectfully submitted,

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